

CANAL ZONE REPORTS

VOLUME 3

CASES ADJUDGED

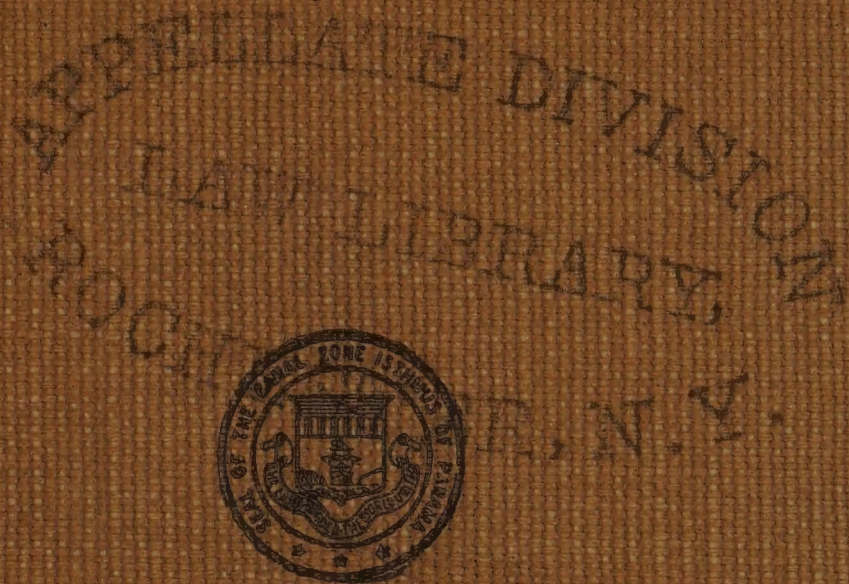
IN

THE DISTRICT COURT

FOR

THE CANAL ZONE

FROM MAY 1, 1914,
TO JANUARY 1, 1926



PANAMA CANAL PRESS
MOUNT HOPE, C. Z.
1927

New York State Unified Court System



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1927

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CHARLES KERR.....July 18, 1921, to July 19, 1922
JOHN D. WALLINGFORD.....October 4, 1922, to September 20, 1924
G. H. MARTIN.....Since October 17, 1924
HENRY D. CLAYTON.....Special Judge
JAMES W. BLACKBURN.....Special Judge

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CASES ADJUDGED
IN THE
DISTRICT COURT FOR THE CANAL ZONE
FROM

July 1, 1914, to December 31, 1925

DIEZ *versus* SCHUBER.

(District Court, Canal Zone, Balboa Division, January 7, 1915.)

Civil No. 40.

1. JUDGMENTS. *RES JUDICATA*.

Judgments rendered in the Republic of Panama, by the laws of which our judgments are reviewable on the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are only *prima facie* evidence of the plaintiff's claim.

2. JUDGMENTS. *COMITY*.

In the absence of statute or treaty, the comity of this country does not require that judgments of a foreign country be recognized as conclusive in this country where such foreign country does not give like effect to our own judgments.

3. JUDGMENTS. *RES JUDICATA*.

A judgment rendered between the same parties and involving the same issues in the courts of the Republic of Panama, is of no force or effect in the Canal Zone unless it be duly authenticated, and then its only effect is to establish, *prima facie*, the rights of the parties as fixed by the terms of the judgment.

Attorney for plaintiff, *Wm. H. Carrington*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. The plaintiff in this action seeks to recover from the defendant the sum of \$1,179, United States currency, as damages arising out of a contract made and entered into between the parties on the second day of December, 1912. The contract in question was one of copartnership, and the plaintiff alleges that he was induced to enter into same by reason of false and fraudulent representations on the part of the defendant and that by reason thereof, and the subsequent rescission of said contract, he sustained the damages set forth in his complaint.

Defendant interposes a plea of *res judicata*, predicated upon facts set forth in said plea, that practically the same matters and things were adjudicated between the parties hereto in the municipal court of the City of Panama, R. P., in which judicial proceeding the defendant in this action recovered against the plaintiff herein the sum of \$282.55, Panamanian silver, which judgment was afterwards affirmed by the Circuit Court of the First Circuit of the City of Panama on the second of June, 1914. Copies of said judgments are attached to and made a part of the said plea of *res judicata*.

It is insisted by the plaintiff that the litigation in the Republic of Panama did not necessarily, or in fact, involve the same questions as are here presented for determination. But a careful reading of the judgments of the Panamanian courts has led me to the contrary conclusion for it would seem that in the Panamanian courts all questions arising out of the liquidation of the alleged partnership between the parties passed in review before those courts, or at least that each party thereto had his day in court as to all questions that might possibly arise out of the liquidation of the said contract which is the basis of the present suit. I am therefore led to conclude that substantially the same questions were involved in the Panamanian court as are here presented for determination.

However, it must be said, in the first instance, that the said judgment of the Panamanian courts, which is attached to the defendant's plea, is but an unauthenticated copy and as such is not admissible for the purpose of establishing the defense of *res judicata* which is here invoked.

In this connection I quote from 23 Cyc. page 1161, as follows:

The judgment should be authenticated by the seal of the court, if any, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the country and the impress of its great seal.

The noncompliance with this prerequisite is sufficient to exclude here the admission of the judgment as a bar to the action in question. But aside from this formal objection, a more fundamental one is presented and that is as to the conclusive force and effect of a judgment in the Panama courts when sued upon or pleaded in bar in this court.

It was stated in argument by counsel for the plaintiff, and not denied, that the Panamanian courts did not give full force and effect to the judgments of this court, but that causes of action which had been determined here could be, and in fact were, readjudicated in the Panamanian courts in actions brought therein. Such being the case, their judgments could not, under the ruling of the Supreme Court of the United States, be held as final and conclusive here.

In *Hilton vs. Guyot*, 159 U. S. 113, it was held as follows:

7. Judgments rendered in a foreign country, by the laws of which our judgments are reviewable on the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are only *prima facie* evidence of the justice of the plaintiff's claim.

8. In the absence of statute or treaty, the comity of this country does not require that judgments of a foreign country be recognized as conclusive in this country, where such foreign country does not give like effect to our own judgments.

9. In an action on a French judgment, evidence by defendant that the French courts give no force and effect to the judgments of this country against French citizens, and that they are there reexamined on the merits, although rendered after proper personal service of process made in this country, is admissible.

This proposition of law seems sustained by the great weight of authority and the principle thereof would clearly preclude the judgments of the courts of Panama from having more than *prima facie* force and effect in our courts. In other words, the judgment of a court of a foreign jurisdiction is conclusive only upon the principle of comity between the countries. Among the different States of the Union the judgments of the courts of the different States are conclusive by virtue of an express provision in the Federal Constitution. But in cases where this constitutional provision does not control, and where there is no international comity existing between the two governments as to the recognition of the judgments of their respective countries, there is no requirement that the judgments of foreign countries should be held binding and conclusive. As a matter of fact, the contrary has frequently been held.

For instance, in *Mills vs. Duryee*, 7 Cranch, 481, it is held:

A foreign judgment is only *prima facie* evidence at common law.

In support of this a number of decisions are cited. This seems to be the rule recognized in *Hilton vs. Guyot*, 159 U. S. 113, especially with reference to executory judgments, *i. e.*, judgments for the recovery of money only as distinguished from the judgment of a foreign court with reference to the *res* over which said foreign court has jurisdiction. For instance, it is stated in *Hilton vs. Guyot* as follows:

There is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money only.

Further:

A judgment purely executory rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, is not in all cases conclusive against the latter in an action brought in his own country to enforce the judgment.

It would therefore seem, as a principle of law, that where an executory judgment for the recovery of money only is sued upon in a foreign jurisdiction or is pleaded in bar to another action brought, that it is at most only *prima facie* evidence and not obligatory unless there exists between the two jurisdictions some constitutional provision requiring that it

should be obligatory or unless it is shown that there is a comity between the respective governments by which the judgments of their courts are reciprocally considered as conclusive.

It follows from the foregoing that the plea of *res judicata* must be and the same is overruled.

[NOTE]. See decision on this case p. 57.

GEORGE *versus* UNITED FRUIT COMPANY.

(District Court, Canal Zone, Cristobal Division, February 13, 1915.)

Civil No. 56.

1. JURISDICTION. TRANSITORY ACTION.

Where it appeared that the plaintiff is an alien, resident of the Republic of Panama, and the defendant is a corporation existing under the laws of Massachusetts, U. S. A., and the plaintiff was injured in an accident on the defendant's railroad track at Almirante, in the Republic of Panama, while in the performance of duties as an employee of the defendant, *held*, that the courts of the Canal Zone will decline jurisdiction of such an action on the grounds of public policy, even though the defendant has property and an agency in the Canal Zone, notwithstanding the provisions of the Executive Order of July 28, 1910 (E. O. 98), it appearing that the courts of Panama are open to the plaintiff for the redress of the alleged wrong, and that service of process could be had on the defendant in the Republic of Panama.

Attorneys for plaintiff, *V. E. Bruno* and *E. A. Reid*.

Attorney for defendant, *T. C. Hinckley*.

JACKSON, District Judge. In this case the complaint shows that the plaintiff is a West Indian, at present residing at Colon, Republic of Panama; that the defendant is a corporation organized and existing under the laws of the State of Massachusetts, United States of America, having personal and real property and an agency, and carrying on business at Cristobal, Canal Zone; and that while said plaintiff was employed on one of defendant's cars on its railroad track at Almirante, Bocas del Toro, Republic of Panama, and while in the performance of his duties shoveling ballast, he was injured by a collision, which is alleged to have been the result solely of the negligence and carelessness of the defendant, through its agents and employees, as a result of which his arm was crushed, necessitating the amputation at the shoulder and by reason of which plaintiff asks damages in the sum of \$10,000 U. S. C.

It will be seen from the foregoing that the plaintiff is an alien nonresident of the Canal Zone; that the defendant is a foreign corporation; and that the alleged cause of action arose wholly without the Canal Zone, viz: in the Republic of Panama. For these reasons the defendant interposes a plea to the jurisdiction of the court and authorities are

cited which would seem to support the theory that there is actually no jurisdiction in such cases. It was decided in New York, for instance, in the case of *Robinson vs. Ocean Steam Navigation Co.*, 2d L. R. A. 631, as follows:

We therefore have a case where plaintiff is a nonresident, the defendant a foreign corporation, and the cause of action did not arise within this State; and therefore, no court within this State has jurisdiction of the action.

However, there are a number of cases that appear to hold that in transitory actions of this kind, the courts may properly assume jurisdiction, and there are also other well-considered cases that hold that even if there be the necessary jurisdiction, the courts will, under certain circumstances, refuse the exercise thereof for reasons of expediency, public policy, or comity.

Section 1 of the Executive Order of July 28, 1910, provides as follows:

No civil action or special proceeding shall be brought or proceeded with in the courts of the Canal Zone, in any case in which both the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action arose without the territorial limits of the Canal Zone Government, and the party proceeded against has no property within such territorial limits, subject to the jurisdiction of the Canal Zone courts.

However, it was said by the Supreme Court of the Canal Zone, in construing this section in the case of the *Panama Development & Manufacturing Co. vs. Lam Hing & Co.*, 2 C. Z. Rep., 300, as follows:

It will be noted that while the Executive Order provides negatively that no civil action shall be brought in the courts of the Canal Zone in which both parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone Government, and the party proceeded against has no property within said territorial limits, that it does not affirmatively provide the converse thereof, viz: that *any* civil action may be brought in the Canal Zone courts where the parties are alien nonresidents and the cause of action arose without the territorial limits of the Canal Zone, provided the party proceeded against has property within the said territorial limits subject to the jurisdiction of the Canal Zone courts. In other words, it was not intended by this provision to extend to the Canal Zone courts a jurisdiction of local actions which it did not otherwise possess.

And I may add here that it was not intended by this provision of the Executive Order to extend to the Canal Zone courts a jurisdiction in transitory actions where the court would not otherwise have jurisdiction, or where it would be otherwise inadvisable on the grounds of expediency, comity or public policy.

In the *Lam Hing* case the Supreme Court said further:

But even if this were a transitory action as distinguished from one purely local, we think the court should be slow to assume jurisdiction thereof upon the broad question of policy.

and the Supreme Court there distinguished from other cases where one of the parties in each of such other cases had been residents of

the Canal Zone. The Supreme Court further said in the Lam Hing case as follows:

But here we have a case where both parties, plaintiff and defendant, are citizens and residents of the Republic of Panama, where the contract was made in Panama to be fully executed therein, and the subject matter thereof situated wholly within the territorial limits of Panama. Aside from the question of the doubtfulness of the ability of our courts to do perfect justice to all parties under such circumstances, it may be said that as a question of policy, the parties under such circumstances should be left to litigate their claims in their own courts, in the jurisdiction where the contract was made, where the property was situated and where the contract was intended to be performed.

In support thereof, there was cited and quoted the case of Mexican National Railroad *vs.* Jackson, 31 L. R. A. 276, and the Supreme Court further said as follows:

While not attempting in this opinion to lay down a rule for the guidance of all jurisdictional questions, for determination hereafter arising in transitory actions that may be brought in the courts of the Canal Zone by citizens and subjects of Panama or other foreign jurisdictions against other foreign citizens and residents upon foreign contracts or rights arising in foreign jurisdictions, we think that the principles announced in the cases of Little *vs.* C. St. P. M. & O. Ry. and Mexican National R. R. *vs.* Jackson ought to serve, to a great extent, as a guide, and that the assumption of jurisdiction in such cases should be closely and carefully scrutinized. In so stating we are satisfied that the courts of the Republic of Panama would, under like circumstances, be guided by similar considerations; that is, that in an action arising wholly between citizens of the United States, resident and domiciled in the Canal Zone, upon a contract or cause of action made or arising in the Canal Zone, and relating to matters to be performed wholly within the Canal Zone, the courts of the Republic of Panama would, upon principles of policy, if not from lack of jurisdiction, be loath to assume jurisdiction of such causes.

The Court of Queen's Bench of Great Britain has similarly decided that the declination of jurisdiction of a cause of action based on an extraterritorial tort is within the discretion of the court when the parties are nonresidents. Therefore, basing the decision in this case upon the matter of discretion, it must be said that the courts of our sister Republic, Panama, where the wrong was alleged to have been committed, and where the plaintiff lives, are open to the plaintiff. The defendant maintains its offices in the Republic of Panama and conducts its business therein. The contract of service was entered into and to be performed in the Republic of Panama. The alleged injury occurred while acting as an employee in the service of the railroad of the defendant in Panama, which said railroad does not extend into the Canal Zone, and it would seem that under all these circumstances, that this court should not take upon itself to determine the controversy but that justice would better be served by leaving the plaintiff to seek his remedy in the Republic in which he resides.

The plea to the jurisdiction is therefore sustained.

[NOTE]. On Transitory Actions, see decision of Circuit Court of Appeals in Panama Electric Co. *vs.* Moyers, 249, F. 19, and Theoktistou *vs.* P. R. R. Co.—Fed. (2)—; *Certiorari* to Sup. Ct. denied.)

DIXON *versus* GOETHALS.
ANDERSON *versus* GOETHALS.

(District Court, Canal Zone, Cristobal Division, March 15, 1915.)

Civil No. 71.

1. JURISDICTION. INJUNCTION.

Where plaintiffs whose lands were situated in the Canal Zone sought to enjoin their removal from the lands by the officials of the United States until they had been paid compensation for the expropriation of the lands, it is held that the court is without jurisdiction to grant an injunction restraining threatened acts of dispossession in advance of payment of compensation for the property taken, the treaty between the United States and the Republic of Panama and the Panama Canal Act providing for such expropriation without first paying compensation, and providing for a Joint Commission with exclusive jurisdiction to determine the amount of compensation.

2. TREATIES. CONSTITUTIONAL LAW. CONFLICT OF LAWS.

The treaty between the United States and the Republic of Panama providing for expropriation of land in the Canal Zone without precedent payment of compensation therefor, is not a violation of the "due process" clause of the Constitution of the United States or the provisions of the Constitution of the Republic of Panama with respect to expropriation.

3. TREATIES. EFFECT OF TRANSFER OF SOVEREIGNTY.

Where a government, by treaty, parts with sovereignty over a part of its domain, the new sovereign may legislate with respect thereto without regard to constitutional provisions of the granting sovereign.

(NOTE—Dismissed by C. C. A., 221 Fed., 1021.)

See, *Reina vs. Bracho*, 256 Fed. 834.

Attorneys for plaintiff, *Fairman, MacIntyre and Enderton*.

Attorneys for defendant, *W. K. Jackson and C. R. Williams*.

JACKSON, District Judge. The plaintiffs in the above-entitled cause seek an injunction restraining defendants from the forcible seizure and destruction of their properties pending proceedings before the Joint Commission to determine the value thereof, and the payment of the amounts therefor.

The theory advanced by the plaintiffs in support of their application is that in cases of expropriation of private property for public use upon the Canal Zone, injunction should issue to prevent the dispossession of the owner until he receives compensation for his property as required by the Constitution and laws. In support thereof they rely upon the provisions of the Constitution of the Republic of Panama which were in force and effect at the time of the ratification of the treaty between the United States and the Republic of Panama. The provisions of the Panama Constitution in question are as follows:

For serious reasons of public utility, defined by the legislator, forcible alienation may take place by means of a judicial order, and indemnity shall be paid for the value of the property before the expropriation takes place.

Also:

The private interest will give way to the public interest. But the expropriation which it is necessary to make, requires previous and full indemnization.

And also:

For important reasons of public utility, defined by the legislator, there can take place the forced alienation of property or rights under judicial writ, but the payment of the declared value will be made before dispossessing the owner of same.

And the conclusion which the plaintiffs' counsel reaches is that the inhabitants of the Canal Zone have not lost any of the guaranties of the Constitution of Panama, and that in so far as these constitutional guaranties are abrogated or infringed by the treaty, that such provisions of the treaty are unconstitutional and void.

It is their contention that a treaty can not grant, convey, or barter rights of the citizens which are protected by a constitution and that treaty provisions in contravention of preexisting constitutional guaranties have no binding force or effect. Generally speaking, this proposition may be conceded, but it must be equally conceded that where a government, by treaty, parts with the sovereignty of a part of its possessions, that the new sovereignty is equally empowered to legislate therefor without regard to preexisting laws or constitutions.

The treaty in question was ratified shortly after the Republic of Panama had achieved its independence from Colombia, and Article 1 of the said treaty provides: "The United States guarantees and will maintain the independence of the Republic of Panama." In consideration of such guaranty on the part of the United States and other provisions contained in said treaty, it was provided in Articles 3 and 6 thereof as follows:

ARTICLE III.

The Republic of Panama grants to the United States all the rights, power, and authority within the Zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.

ARTICLE VI.

The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation,

and protection of the said Canal or of the works of sanitation and protection herein provided for, shall be appraised and settled by a Joint Commission appointed by the Governments of the United States and the Republic of Panama, whose decisions as to such damages shall be final and whose awards as to such damages shall be paid solely by the United States. No part of the work on said Canal or the Panama Railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention.

But it is contended by counsel for plaintiffs that the provisions of Article VI of the treaty can have no binding force and effect so far as to deprive a property owner of his property without compensation in advance, because the President, by Executive Order of May 9, 1904, expressly declared that:

The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force on the Canal Zone and in other places on the Isthmus over which the United States has jurisdiction, until altered or annulled by the said commission * * *

It is their contention that this Executive Order of the President necessarily put in force and operation in the Canal Zone, all of the constitutional guaranties of the Constitution of Panama. But to this it may be answered that this Executive Order was made subsequent to the ratification of the treaty and was made in contemplation of the fact that the provisions of said treaty were in force and operation in the Canal Zone and that among said treaty provisions were the following:

* * * unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior.

And also:

No part of the work on said Canal or the Panama Railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed, or impeded by or pending such proceedings to ascertain such damages.

It may also be stated that if the President of the United States could, by Executive Order, create a constitution or system of laws for the government of the Canal Zone, that the Congress of the United States could so do with equal authority. And in fact, the laws established for the temporary government of the Canal Zone by the said Executive Order, have been altered, superseded, and in other respects ratified, by the Panama Canal Act of August 25, 1912, wherein Section III thereof provides as follows:

The President is authorized to declare by Executive Order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish, by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto

secured in the United States and compensation therefor fixed and paid in the manner provided in the aforesaid Treaty with the Republic of Panama, or such modification of such Treaty as may hereafter be made.

In other words, this provision of the Panama Canal Act says that private property is to be taken pursuant to the provisions of the treaty, and the treaty does not require compensation to be paid *in advance* to private owners, but, on the contrary, expressly provides that the work shall not be prevented or impeded by reason of the failure to make such compensation in advance.

This, therefore, must be said to be the law in the Canal Zone, not only by virtue of the provisions of the treaty, but by virtue of the provisions of the Act of Congress, acting in its lawmaking capacity, and expressly recognizing the provisions of the treaty as the law applicable in such cases.

The right of private property is, of course, inviolable and such property can not be taken for public use without just compensation, and the Executive Order of May 9, 1904, recognizes this sacred and inalienable right. The Executive Order states:

The inhabitants of the Canal Zone are entitled to security in their persons, property, and religion, and in all their private rights and relations.

But while this is so, the time and the means for obtaining such compensation must be looked upon more in the nature of a method or process in the administration of justice. This would appear to be the view taken by the Attorney General of the United States in his letter of January 22, 1914, to the Secretary of War, wherein he states as follows:

The Panama Act, however, in thus authorizing the President, expressly provided that the compensation for lands taken should be fixed and paid in the manner provided in the treaty, and the treaty expressly provided that this compensation should be appraised and settled by a joint commission appointed by this country and Panama. It is true that the treaty also provided that the work on the Canal should not be prevented "by or pending such proceedings to ascertain such damages," and that this provision, by reason of the Panama Act, and the Executive Order of the President, is extended to all the lands within the Zone. Nevertheless, it may be claimed, on respectable grounds, that this provision contemplated a tribunal, ready to adjudicate all claims for such damages, as an essential part of the procedure, and did not intend to permit this Government, by a failure to appoint its quota of the Commission, to take lands without affording any real chance of a judicial arbitrament at any time upon the compensation to be paid. In other words, this provision of the treaty may have been inserted in view of the rule of Constitutional Law that compensation for land taken in condemnation proceedings need not be paid in advance, provided some impartial tribunal is secured before whom claims may be presented, and may have been inserted, therefore, in order to secure the continuous presence of such an impartial tribunal.

This was also the view that the writer of this opinion expressed in the case of *Rangel vs. Feuille and Johannes*, 2 C. Z. Rep. 317. It was there stated:

Can, therefore, the United States claim the benefit of the treaty provision not to be impeded, hampered, or delayed in its work on the Canal, in other words, not to be required to make just compensation in advance of the taking of private property, without itself complying with the correlative obligation provided for by the treaty, to maintain a Joint Commission for the consideration of the rights of owners whose property is taken? The Republic of Panama has now two members of said Commission appointed and ready to act in the premises, but the Commission has practically ceased to exist since November last because of the failure of the United States to appoint members thereof pursuant to the express requirements of the treaty. Can the United States therefore, by its own act of recalling its commissioners or failing to appoint others pursuant to the provisions of Article 15 of the treaty, thereafter claim the correlative benefits of the treaty, which should go hand in hand with the correlative obligation of maintaining a Commission for the consideration of claims for damages to private property?

The injunction was granted in that case because of the existence of the above stated facts, viz: That there was no commission in existence at that time, and while the views therein expressed are still adhered to and are still considered sound by the writer thereof, and would seem to have met with the complete approval of the Attorney General as set forth in his letter above quoted, nevertheless, the clear intimation of all who have passed upon this question would seem to be that where there is such a Commission constituted and ready for the transaction of business, that the authorities could not be enjoined for taking property in advance of compensation merely because of the time required by the Commission to reach and decide the claimants' individual cases.

The Supreme Court of the Canal Zone, in its opinion rendered in the appeal of the Rangel case, stated as follows:

In our opinion there could be no arguable basis for the temporary injunction were it not for the fact that at the date of the entry of the decree the Joint Commission was not in existence. * * *

* * * In view of the foregoing it is apparent that the organization of the Joint Commission has rendered unnecessary the consideration of any question of law raised by the appeal.

For the reasons stated, it follows that the application for injunction must be and the same is hereby denied.

LAPORT, Administratrix, *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division, April 1, 1915.)

Civil No. 52.

1. ALIENS. JURISDICTION. NEXT OF KIN. ILLEGITIMATES. SUCCESSION.

Action brought by the plaintiff, administratrix of the estate of Albert Laport, deceased, to recover damages for the death of Albert Laport while acting as an employee of the defendant resulting from the defendant's negligence. It appears that Albert Laport was an alien, a subject of Grate Braten, and the

illegitimate son of Aggelia Druell, *alias* Ella Laport, an alien; that the plaintiff is a sister of the deceased; and that the action is brought for the benefit of the plaintiff and the mother. The action is brought under the Federal Employers' Liability Act. It is held:

1. That in view of the fact that the death of Albert Laport occurred in the Canal Zone, and that the defendant conducts business and has property in the Canal Zone, that this court has jurisdiction of the action.
2. That under the provisions of article 1050, p. 228, of the Civil Code of Panama, in force in the Canal Zone, the illegitimacy is no bar to inheritance from the deceased.
3. While the word "child" or "children" used in the statute or law means, *prima facie*, legitimate child or children, and while it is usually held that no action can be maintained for the death of an illegitimate child, yet in jurisdictions where illegitimacy is not a bar to inheritance, such an action may be maintained, especially if brought through an administrator for the benefit of the next of kin, and where such illegitimate relatives are regarded by statute as such next of kin; distinguishing the case of *P. R. R. Co. vs. Vreeland*, 227 U. S., 59.

Attorney for plaintiff, *Ernest Best*.

Attorney for defendant, *Charles R. Williams*.

JACKSON, District Judge. The plaintiff, as administratrix of the estate of Albert Laport, deceased, seeks to recover damages in the sum of \$10,000, arising out of the death of the said Albert Laport while acting as an employee of the defendant company on or about the 27th day of March, 1914.

It is alleged that the death was the result solely of negligence and carelessness on the part of the defendant company, and the action is brought by such administratrix to recover damages under and pursuant to the provisions of the Federal Employers' Liability Act of April 22, 1908.

The defendant interposes an answer to the effect that the deceased, Albert Laport, was a native of the island of St. Lucia, British West Indies, and a subject of Great Britain, and that he was the illegitimate son of Aggelia Druell, *alias* Ella La Porte, who was also born on the Island of St. Lucia. To this answer the plaintiff interposes a demurrer.

It appears that the plaintiff, Ella Laport, is the sister of the deceased, and Aggelia Druell the mother of the deceased and the action is brought by the administratrix on behalf of said mother and sister as next of kin, dependent upon the deceased.

The two questions raised by the demurrer to the answer are, first, as to the right of aliens to recover in the courts of the Canal Zone for damages resulting from the death of an employee, and, second, as to the right to maintain such action on behalf and for the benefit of illegitimate parents or next of kin.

As to the first proposition it must be said that it was decided in *McGovern vs. Philadelphia R. R. Co.*, 209 Federal Reporter, 975, that

"a foreigner, resident of his native country, can not be considered a beneficiary of the provisions of the Federal Employers' Liability Act, and that hence an action can not be maintained by the administrator of a deceased railroad employee, whose death occurred while he was engaged in interstate commerce, for the benefit of deceased's father and mother, who were subjects of Great Britain and residents of Ireland."

"It is not to be presumed," said the Court, "that Congress intended to legislate for the benefit of persons residing out of the jurisdiction of the State and Federal laws. The right to recover damages for death is not a right at common law, and, when Congress undertakes to impose a liability upon interstate carriers for the benefit of their employees and relatives of their employees in case of death through the carrier's negligence, in the absence of any provision to the contrary in a treaty or act of Congress, it must be presumed that such benefits are not intended for nonresident aliens."

This is undoubtedly a sound and salutary principle of law as applied to conditions prevailing in the States, but to apply the same to conditions here prevailing as to citizens or residents of the Republic of Panama who sought relief in our courts against companies or individuals doing business in the Canal Zone, we think would be manifestly unfair and would not be in accordance with the spirit of the treaty between the United States and the Republic of Panama. If such a rule were enforced here it would result in manifest hardship and even an absolute denial of justice. The residents of the Republic of Panama have always been accorded the right to resort freely to our courts in causes of action arising within our territory and this seems to be recognized not only by the treaty existing between the two Governments, but by Section 1 of the Executive Order of July 28th, 1910, which would seem to give to alien nonresidents of the Canal Zone the right to institute transitory actions in our courts provided that the cause of action arose within the territorial limits of the Canal Zone Government, or the party proceeded against has property therein subject to the jurisdiction of the Canal Zone court.

In this case it will be remembered, the cause of action is alleged to have arisen in Cristobal, Canal Zone. The defendant operates a railroad and has property within the Canal Zone, and the mother and sister of the deceased, although illegitimate, have continuously resided in Colon, Republic of Panama, since the year of 1907.

As to the second proposition, the Federal Liability Act of April 22, 1908, provides that common carriers by railroad

shall be liable in damages to any person suffering injury while employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee * * *

And it must be conceded that it is a well-recognized rule of construction that *prima facie*, the word "child" or "children" when used in statutes means legitimate child or children and that bastards are not within the meaning of the term, and therefore, where parents are given a right of action for the death of a child, such action can not be maintained by a parent for the death of a bastard. Accordingly it has been held by the courts of many States, and likewise by Federal Courts, that where, under the statutes, a parent sues directly to recover damages for the death of a child, recovery is not permitted for the death of an illegitimate child. But, this it will be noted, is in cases where actions are brought by the parent direct and not through an administrator for the benefit of the next of kin dependent upon the deceased.

In this case the deceased left surviving him neither widow nor children and the action is therefore instituted by the administratrix, as such, for the benefit of the next of kin dependent upon such employee. It is true that the illegitimate mother and sister appear to be the next of kin, and as such may be the sole recipients of any recovery that may be had. But, if illegitimates are permitted by statute to inherit from each other, it would seem that they must nevertheless be regarded as such next of kin. Article 1050, page 228 of the Civil Code of Panama, clearly gives the illegitimate mother and sister the right to inherit property left by the deceased if he dies without leaving legitimate heirs.

In *Security Co. vs. West Chicago Street Railway Co.*, 91 Ill. Appeals, 332, it was held that under a statute giving a right of action for death by wrongful act, for the benefit of the widow and next of kin of a deceased person, the mother had the right to recover for the negligent killing of her illegitimate child, where by statute she was permitted to inherit from her illegitimate child if it die without leaving children or surviving widow or husband. The same was held in *Marshall vs. Wabash R. R. Co.*, 120 Missouri, 275:

that since, by the statutes of the state, an illegitimate child was made capable of inheriting from its mother, and the mother of inheriting from the child, there could be no good reason why a mother should not be permitted to recover for the negligent killing of her illegitimate child.

In *Muhl vs. Michigan Southern R. R. Co.*, 10 Ohio State 272, the Court said:

" * * * since the negligent killing was admitted, and the action was properly brought by the personal representative of the deceased as provided by statute, it could not be said that any cause for nonsuit existed; that, whether the illegitimate son of the deceased, or her sister, who was shown by the record to have been in court, was to be regarded as the next of kin, could in no wise affect the cause of action; that that question might be a very proper one in determining who in fact was the legal beneficiary and finally to be entitled to the fruits of the judgment, but that the right of action existed, by force of the statute, in the administrator."

The conclusion would seem to follow that whereas it is a general rule of construction that *prima facie* the word "child" or "children" used either in statute or a will means legitimate child or children, and it is usually held that no action can be maintained for the death of an illegitimate child, nevertheless, in jurisdictions where such mother and child, or brother and sister, are permitted to inherit from each other, such an action may be maintained, especially if it is brought through an administrator for the benefit of the next of kin; and such illegitimate relatives are regarded by statute as such next of kin. This I do not consider to be in contravention of the rule announced by Mr. Justice Lurton in the case of *Michigan Central R. R. vs. Vreeland*, 227 U. S. 59, to the effect that:

A Federal statute upon a subject exclusively under Federal control must be construed by itself and can not be pieced out by state legislation and if a liability does not exist under the Employers' Liability Act of 1908, it does not exist by virtue of any state legislation on the same subject.

This is undoubtedly true as to any substantive and independent provision of state legislation that must be looked to to "piece out" or give a right under the Employers' Liability Act of 1908. But I am of the opinion that when that act itself, by its express terms, gives a right of action to the *next of kin* when there is no widow or husband or children surviving the deceased employee, that resort can be had to the local statutes for determining who are the next of kin, and if an illegitimate mother and sister under the local statutes in force in such jurisdiction can inherit, they may be considered as such *next of kin*. Especially is this so when, it must be remembered, Congress did not attempt to define who were to be considered the next of kin, but on the contrary, each State has its own statutory provisions in this regard and therefore Congress must be supposed to have had in mind "next of kin" as defined and prescribed by the different state or territorial jurisdictions.

The demurrer is therefore sustained.

LAPORT, Administratrix, *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division, April 21, 1915.)

Civil No. 52.

1. LETTERS OF ADMINISTRATION. VALIDITY.

Letters of administration issued by the clerk pursuant to the authority and direction of the court, are sufficient to enable the plaintiff to sue as administratrix.

2. ADMINISTRATION. BOND OF ADMINISTRATOR.

The order appointing the administratrix did not require a bond to be given. Code of Civil Procedure, Sec. 678, requires that executor or administrator shall

give bond in such reasonable sum as the court directs. Held, that no bond having yet been required, the administratrix should not, for this reason, be barred from maintaining an action.

3. FEDERAL EMPLOYERS' LIABILITY ACT. CONTRIBUTORY NEGLIGENCE.

The Federal Employers' Liability Act of April 22, 1908, abolished the defense of contributory negligence.

4. INHERITANCE. ILLEGITIMATES. NEXT OF KIN. DAMAGES. MEASURE OF.

Albert Laport was killed as a result of the negligence of the defendant while in the course of his employment by the defendant. He was the illegitimate son of Aggelia Druell, *alias* Ella Laport, and the plaintiff in this action is his illegitimate sister. *Held:*

1. That the illegitimate sister is not entitled to inherit from the deceased.
2. That the illegitimate mother is entitled to inherit from the deceased.
3. That the deceased being 3 years and 2 months under the age of majority, that the mother had no expectation of receiving support from him after he attained his majority and could not, therefore, recover damages for loss of maintenance after the deceased would have reached the age of 21 years.

Attorney for plaintiff, *Ernest Best*.

Attorney for defendant, *Charles R. Williams*.

JACKSON, District Judge. On August 5, 1914, an order of the District Court of the Cristobal Division was duly made and entered appointing the plaintiff, Ella Laport, administratrix of the estate of Albert Laport, deceased. It is nevertheless insisted by counsel for the defendant that the letters of administration issued upon said order being signed by the clerk of the court instead of the judge thereof, the plaintiff is not entitled to sue as administratrix. We think the order of appointment and the letters of administration issued by the clerk, under and pursuant to authority and direction of the Court, are sufficient to enable plaintiff to sue as administratrix.

It is further insisted that there has been no compliance with sections 677 and 678 of the Code of Civil Procedure of the Canal Zone in that no bond has been given by the administratrix as such. However, the order of appointment does not require a bond to be given. It is silent in this respect, and section 678 requires that the executor or administrator "shall give a bond in such reasonable sum as the Court directs." It may be that prior to receiving and disbursing any funds a bond may be required in the future, but as yet no bond having been required, it would seem that the administratrix should not, for this reason, be barred from instituting an action.

This brings us to a consideration of the merits of the case. The facts as developed at the trial show that the deceased, Albert Laport, was employed by the defendant as a helper on switch engine No. 302, operating in the yards of the defendant company at Cristobal, and that

as such, it was his duty to ride on the footboard in front of such engine in such a position as would enable him to observe and see the track ahead and so safely pilot the said engine. On the morning of the 27th of March, 1914, about 4.20 a. m., while riding on the footboard in front of said engine which was proceeding in a southerly direction upon a southbound switch track, at Cristobal, Canal Zone, and in the neighborhood of the Defendant Company's paint shop, there was a collision with a train proceeding north upon the same track propelled by engine No. 9 pushing two cars, and as a result of such collision, Albert Laport received injuries from which he shortly thereafter died.

The testimony of one Creighton who was riding with the deceased on the footboard at the time of the collision was to the effect that there was no light of any kind upon the forward car which was proceeding northerly along the southbound track, so that the approach of this car pushed forward by engine No. 9 could not be seen in the darkness in time to avoid a collision. That the known custom and usage with respect to the use of that track was such that engines and cars proceeding north thereon were expected to carry lights on the forward car as a precautionary measure so as to be able to warn the engineer of approaching danger. The engineer of engine No. 302 also testified that there was no light on the approaching train. The engineer on engine No. 9 testified that before starting northward on this southbound track, he directed a man with a lantern to go on top of the cars but that he received no signal from him of the approach of engine No. 302.

From the direct evidence of Creighton and the engineer of engine No. 302, and the statement of engineer on engine No. 9, that he received no signal, it is reasonable to infer that there was no one with a light on the forward end of the car. In fact the preponderance of the evidence decidedly so indicates, especially as the defendant offered no evidence whatsoever in its behalf. Such being the case, it must be said that the defendant, in proceeding northerly on this southbound track without a light on the forward car, was lacking in that degree of care and prudence which the law requires, and that this neglect was at least in part responsible for the death of Albert Laport.

The defense of contributory negligence could not be urged even as a fact in the case, nor as a matter of law. The Employer's Liability Act of April 22, 1908, had as one of its objects, the abolishing of the defense of contributory negligence. This therefore brings us to consider the question of damages.[^]

The act above referred to provides that the common carriers by railroad therein referred to "shall be liable in damages to any person suffering injury while employed by such carrier in such commerce, or,

[^][EDITOR'S NOTE]. See 35 Stat. 65; T. & A. 46, Sec. 3, for correct statement of the law.

in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow, or husband and children of such employee; and if none, then to such employee's parents; and if none, then to the next of kin dependent upon such employee."

Albert Laport left surviving him neither widow nor children and the action is instituted by his illegitimate sister for the benefit of herself and the illegitimate mother of the deceased as the next of kin. It would seem that the amount of recovery herein must be exclusively for the benefit of the mother of the deceased inasmuch as the law provides that only upon failure of the parents, shall recovery be for the next of kin. That is, a sister would be regarded as a next of kin and could benefit by the action only in the event there were no parents. The amount, therefore, recovered by the administratrix in this case, must be for the benefit of the surviving mother of the deceased.

It is well-settled law that in actions of this kind instituted for the benefit of the widow or children, they are entitled to recover damages based upon the life expectancy of the deceased. That is, having a legal right and natural expectation of support, they are entitled to compensatory damages for being deprived of that legal right and expectation; and in such cases, the measure of damages is such as the Court or jury may find they would have received from his earning capacity had he lived the ordinary span of life.

However, when there are neither widow nor children, and the action is instituted for the benefit of a parent or next of kin, courts have been guided by other rules. It was held, for instance, in *Deninger vs. American Locomotive Co.*, 185 Federal Reporter, page 23, as follows:

Under the Pennsylvania Act of 1855 authorizing parents to recover for the wrongful killing of their minor children, they could not recover for loss of expected contributions by the deceased after he would have attained his majority.

This seems to be a reasonable interpretation of the law. The wife and children naturally have a right to expect support and maintenance as long as the father and husband may live, but not so with the parents, as it is only reasonable to suppose that after attaining majority, a man will marry and incur the sacred obligations of providing for his own family. Furthermore, while the law requires a man to support his wife and children, there is no such legal requirement as regards his parents after attaining majority. His earnings during minority belong to his parents but not after majority. This is the general rule of law and I find nothing in the Code of the Canal Zone or the Civil Code of Panama to the contrary. The provisions of the latter on page 102 thereof, cited by counsel for the plaintiff, do not seem to support the contention that a son is under a legal obligation, however strong may be the force of the moral obligation, to give his earnings to his parents after attaining

majority. In *Deninger vs. American Locomotive Co.*, above cited, on page 34, it is said:

If the family relation exists at all, either by operation of law or by the conduct of parties and if there is a reasonable expectation of its continuance, the proposition might be easily supported that compensation can only be adequate when it redresses the actual injuries to such expectation.

And so, in *Pennsylvania R. R. vs. Adams*, 55 Penn. 499, where the son was 26 years old and the family relation actually existed at that time, that is, the son was actually living with and contributing to the support of the family at that age, it was held that recovery could be had based upon the reasonable expectation that such would continue. This seems to be the rule laid down in English cases. But where a son meets his death before majority, it has equally been held in a number of cases that then there does not exist, as a matter of fact, that reasonable expectation of a continuance of the support after majority which the law requires. So, it must be said in this case, the legal expectation of support, from the date of the death of the deceased, was but little over three years. The deceased was killed in March, 1914, and would have been 18 in two months thereafter. In computing damages for wrongful death it is a settled principle of law that there can be no compensation for mental grief and suffering, for lacerated feelings or disappointed hopes, for the law can not compensate these in money, but allows only pecuniary damage for the pecuniary loss.

This loss is the reasonable expectation from the earning capacity and the expenses attendant upon the injury and the funeral. No proof was made as to what, if any, expense was incurred by the family of the deceased for medical attention and for the funeral. Therefore, we are not permitted to conjecture as to this, but, looking solely at the deceased's strength, health, ability, and earning capacity at the time of his death, and the probability of its continuance and increase up to the time of his majority, the Court finds a pecuniary loss resulting from his death in the sum of nine hundred and fifty (\$950) dollars.

It is THEREFORE ORDERED that the plaintiff have and recover of and from the defendant, for the benefit of the mother of the deceased, the said sum of nine hundred and fifty (\$950) dollars, and all costs herein.

THE REPUBLIC OF COLOMBIA, *et al.*, versus FAJARDO H., *et al.*

(District Court, Canal Zone, Balboa Division, May 6, 1915.)

Civil No. 105.

1. PRINCIPAL AND AGENT. RIGHT OF ACTION.

Where F stole funds from G, who is described as Postal Agent of the Republic of Colombia, F being G's employee, it is *held* that G can maintain an action therefor without joining the Republic of Colombia.

2. PRINCIPAL AND AGENT, RIGHT OF ACTION.

Where F was Postal Agent of the Republic of Colombia and while acting as such embezzled its funds, it is *held* that G, his successor in office, can not maintain an action for recovery thereof.

3. ATTACHMENT. MONEY IN *CUSTODIA LEGIS*.

Money of defendant deposited as bail in a criminal action may be attached after the dismissal of the action. Funds deposited with an officer of the court are attachable when the purpose of the legal custody has been encompassed and the only duty of the officer having it in custody is to pay it to the depositor.

Attorneys for plaintiffs, *Hinckley and Ganson*.

Attorney for defendants, *Felix E. Porter*.

JACKSON, District Judge. The Republic of Colombia has been withdrawn as a party plaintiff to the complaint herein on motion of the plaintiff's attorney for the reasons stated "that it will not in any manner submit itself to the jurisdiction of the Canal Zone courts owing to the fact that it does not in any manner recognize sovereignty of the United States of America, over a Department which Colombia claims to be its own territory." This leaves the action pending solely between Eduardo Espinosa Guzman in his capacity as Postal Agent of the Republic of Colombia against the defendants Fajardo and de la Guardia, and being so considered it must be held that the plaintiff has no right to institute the action set forth in the second count thereof for the reason that it appears that the defalcations referred to in said second count of the complaint were committed by the defendant Adolfo Fajardo H. at a time when he was acting as the Postal Agent of the Republic of Colombia in the City of Panama; that is, from the 11th day of June, 1913, up to and including the 31st day of December, 1914. It would seem to follow necessarily from the allegations contained in said second count of the complaint that any moneys alleged to have been stolen by Fajardo during the period of time referred to therein were necessarily stolen by him directly from the Republic of Colombia, and, therefore, it must necessarily follow that the plaintiff in his capacity as Postal Agent of the Republic of Colombia has no standing to sue for the recovery thereof. Any action of recovery for the sum therein set forth, namely \$5,913.11, must be instituted by the Republic of Colombia, acting through its duly authorized agents therefor, unless it should appear that the plaintiff has, upon well-recognized principles of law, been subrogated to the rights of the Republic of Colombia. It does not, however, appear in any aspect of the case that the plaintiff has been subrogated to any rights of Colombia, and, therefore, it follows that the demurrer, in so far as it relates to the second count of the complaint, must be and is hereby sustained.

With reference, however, to the first count of the complaint, it seems airily inferable from the allegations thereof, giving to the pleadings that

liberality of construction required by our Code, that the alleged thefts were committed by the defendant Fajardo from the plaintiff Guzman in his capacity of Postal Agent of the Republic of Colombia. The said first count of the complaint alleges that the plaintiff was at all the times therein mentioned the Postal Agent of the Republic of Colombia, and that as such he was accustomed to pay to the Panama Railroad Company direct, or through the defendant Fajardo, certain sums for carrying the mails, and that the said Fajardo "was an employee of the plaintiff in his capacity as Postal Agent of the Republic of Colombia," and also that his alleged payments to the Panama Railroad Company were made "for the account of the plaintiff in his said capacity as the Postal Agent of the Republic of Colombia." Also "that there is now due and owing to the plaintiff in his capacity as Postal Agent of the Republic of Colombia the sum of \$3,469.42. From all of which it is reasonable to infer that the sum in question was stolen from the plaintiff individually, who merely describes himself as the Postal Agent of the Republic of Colombia, and that it was not stolen from the Republic of Colombia itself. Therefore, it would follow, if these facts can be sustained, that the plaintiff individually would have the right of recovery therefor, and it must, therefore, follow that the demurrer to the first count of the complaint must be and is hereby overruled.

Coming now to consider the motion to discharge the attachments upon the ground that the moneys were deposited with the Clerk of the Court for the appearance of Fajardo in the criminal proceedings pending against him; the said criminal proceedings have been dismissed and the bond canceled, and, therefore, there is nothing devolving upon the Clerk except the ministerial duty of refunding the \$4,000 deposited as bail. It seems clear that under such circumstances moneys primarily deposited in court can be attached. See *Dunsmoor vs. Furnestfeldt, et al.*, 12 L. R. A., 510. Also *Weaver vs. Davis*, 47 Ill. 235 wherein it is held:

If the object for which such funds are held has been satisfied, then such officer holds the balance of such funds not as an officer of the court (nor is such balance in *custodia legis*), but as trustee for the person entitled to receive such balance, and in a suit against such person such trustee may be garnisheed.

Also *LeRoy vs. Jacobosky*, 67 L. R. A., 977 as follows:

The proceeds of a judicial sale of lands, confirmed by the court, which are held subject to the immediate demand of the party entitled to them, are subject to attachment by his creditors in the hands of the Clerk of the Court.

Also *Wilbur vs. Flannery*, 60 Vt., 581 as follows:

It has been held that in Vermont that money in the possession of the clerk of the court, paid to him under decree of the court of chancery, is attachable on trustee process when the purpose of the legal custody has been accomplished, and the only duty of the clerk is to pay the amount to the defendant.

Also *LeRoux vs. Boldus*, 13 S. W. (Tex.), 1019, as follows:

It has been held in Texas that where funds of a defendant are held by the clerk of the court to await the determination of the action, out of which a judgment against the defendant is satisfied, the defendant is entitled to the immediate possession of the surplus, without any order of the court, and that, therefore, such surplus in the possession of the clerk is subject to garnishment at the suit of defendant's creditors.

And following the broad general principle in the case of *Marine Nat. Bank vs. Whitman Paper Co.*, 49 Minn., 143, as follows:

Money held by the clerk of a court, but not under order of court, is subject to garnishment.

From the foregoing well-settled principles of law as applicable to the facts of this particular case it follows that the motion to discharge the attachment must be and is hereby overruled.

BRESSIE, *et al.*, versus GOETHALS, *et al.*

(District Court, Canal Zone, Cristobal Division, May 24, 1915.)

Civil No. 84.

1. JURISDICTION. MOTION TO DISMISS.

Plea to the jurisdiction and motion to dismiss, will be treated as a demurrer to the plaintiff's complaint.

2. JURISDICTION. INJUNCTION.

In action brought by plaintiffs claiming to be the owners of land situated in the Canal Zone, to enjoin destruction of improvements on property and forcible dispossession of the plaintiffs, it appearing that the plaintiffs have presented a claim to Joint Commission, and that the prosecution of such claim is an exclusive remedy, *held* that the court has no jurisdiction of the action.

3. JURISDICTION. TREATIES.

Under provisions of treaty between the United States and the Republic of Panama, and the Panama Canal Act and the Executive Order of December 5, 1912, where it appears that a Joint Commission as provided in said treaty has been constituted, *held* that all property in the Canal Zone is necessary for Government purposes, and the rights of former owners thereof must be adjudicated exclusively before the Joint Commission provided for in the treaty.

4. EXPROPRIATION. CONFLICT OF LAWS.

The provision in the treaty between the United States and the Republic of Panama, that the United States may take possession of all the property in the Canal Zone without payment of compensation in advance, does not violate the "due process" clause of the Constitution of the United States or the Constitution of the Republic of Panama.

5. EXPROPRIATION.

Act No. 21 of the Laws of the Canal Zone, providing a method of expropriation proceedings, does not provide a remedy available to the plaintiffs as against the

provisions of the Panama Canal Act and of the treaty between the United States and the Republic of Panama, but the compensation to be paid is to be fixed by a Joint Commission under the provisions of said treaty.

6. PLEADINGS. DEMURRER. SURPLUSAGE.

Unnecessary allegations of a pleading, such as those which are contrary to facts of which judicial notice is taken, and are not admitted by a demurrer, are to be disregarded.

7. LEASES. PRIOR LAWS. NOTICE TO LESSEES.

Where it appears that the plaintiffs leased the property in question in 1911, such lessees were bound by the provisions of the treaty between the United States and the Republic of Panama, which was ratified prior to that date.

Attorneys for plaintiffs, *Fairman, MacIntyre, and Enderton.*

Attorneys for defendants, *Frank Feuille and Walter F. Van Dame.*

JACKSON, District Judge. The Court having heretofore overruled the plaintiff's motion to dismiss the plea to the jurisdiction of the court, filed by the defendants herein, the question now arises upon said plea to the jurisdiction and upon the oral motion of the defendants to dismiss the bill of complaint. The said plea to the jurisdiction and the motion to dismiss, will, therefore, be considered as a demurrer to the bill.

This case is in all substantial respects analogous to that of the case of *Dixon, et al., vs. Goethals, et al* (decided March 15, 1915), in which this Court denied the application for the injunction, and which ruling was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans (221 Fed., 1021). The said Circuit Court of Appeals in dismissing the plaintiffs' appeal to that court stated as follows:

It will be added that an investigation of the record and of the law applicable to the state of facts disclosed has led the court to the conclusion that if the action of the lower court which is complained of had been duly presented here for review, it could not properly be held to be subject to reversal at the instance of the parties complaining of it.

It follows that the restraining order heretofore issued in this case is vacated and annulled, and a mandate may issue at once.

The views of this court were fully set forth in the case of *Dixon vs. Goethals*, and there now remain for consideration in the present case several propositions not advanced or so clearly set forth in the former case. The plaintiffs allege that their property will be destroyed by the Canal Zone police force and they forcibly dispossessed of the same for the purpose of allowing the Texas Oil Company and other oil companies to erect oil tanks for their own private profit and gain, and that at the time of the filing of the complaint herein the employees of the said Texas Oil Company, by authority of the Panama Railroad Company or of the Canal Zone Government, had entered and trespassed upon the

property of complainants. The complaint further alleges in paragraph 9 thereof "that the threatened acts of the respondents are not being done in connection with any work in connection with the construction, maintenance, sanitation, or protection of the Panama Canal, but for the benefit and profit of the Texas Oil Company and other private corporations and persons to your orators now unknown." It is the contention of the complainants that these allegations distinguish the case at bar from the Dixon case so that the burden is upon the defendants to show affirmatively that the taking of the property in question is being done in conformity with the Panama Canal Treaty, Panama Canal Act, and the Executive Order of the President of December 5, 1912.

In *French vs. Senate*, 146 California, page 607, it was held that "those allegations of a pleading which are not necessary, and which are contrary to the facts of which judicial notice is taken, are not admitted by a demurrer, but are to be treated as a nullity."

And in *People vs. Oakland Water Front Co.*, 118 California, page 245, it was said:

Why should a general demurrer to a complaint be overruled and the parties required to proceed to the trial of an issue of fact when the court, looking to a law of which it is bound to take notice, can clearly see that one of the essential allegations of the complaint can never by any legal possibility be proved? What useful or desirable end could be attained by shutting its eyes to the certain event of the litigation and putting the parties to the trouble, delay, and expense of framing and preparing to try issues which can have no influence upon the final result?

The question then arises, are the allegations with reference to the Texas Oil Company at variance with laws, public orders, and facts of which this court is bound to take judicial notice? Section 6 of the Panama Canal Act provides in part as follows:

The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company, or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said Canal.

Furthermore, through Executive Order of the President of the United States, and also through orders promulgated by the Governor of The Panama Canal, it is well known that the Government, by virtue of of the above provision, has embarked in the enterprise of furnishing oil and other materials to passing vessels through the medium of private concerns. Furthermore, as has heretofore been stated in the Dixon case, the Panama Canal Act in Section 3 thereof expressly provided that the President was authorized to declare by Executive Order that all land and land under water within the limits of the Canal Zone is necessary for governmental purposes, and, pursuant to said provision,

the President, by Executive Order of December 5, 1912, has so declared. Therefore, to call for proof as to the facts stated in the plaintiffs' bill of complaint would require the court to shut its eyes to the above cited provisions of the Panama Canal Act and the Executive Order referred to, as well also as to the well-known and publicly declared policy of the Government in this respect. When the President, acting under proper authority, has declared all property in the Canal Zone to be necessary for government purposes, and a Joint Commission has been constituted by the Governments of the United States and of Panama to determine the amounts to be paid for all such property, and the plaintiffs themselves, recognizing these facts, have filed their claim before said Commission for the value of their property, how in equity and common sense can it be said that the taking of the property is a taking for a private and not a governmental purpose, and what useful purpose could be subserved by putting the defendants to proof of a fact of which the court is bound to take judicial notice?

Moreover, in the present case the complainants reiterate with much force and learning the arguments propounded in the Dixon case to the effect that the taking of the property by the Government, without compensation in advance, is without due process of law, and is in violation alike of the Constitution of the United States and of the Constitution of the Republic of Panama; but this question has been given due consideration by this court, not only in the Dixon case but in the Rangel case, and it only remains to repeat the view of this court that the establishment and the maintenance of the Joint Commission provided for by the treaty constitute the necessary process of law. This view has frequently been held in decisions of the highest authority and by eminent text writers. In Cooley's *Constitutional Limitations*, page 813, it is stated:

When the property is taken directly by the State, or by municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. The decisions upon this point assume that, when the State has provided a remedy by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction; since the property of the municipality, or of the State, is a fund to which he can resort without risk of loss.

To the same effect this court again calls attention to the ruling of the Attorney General of the United States in the Rangel case wherein it was said, "In other words, this provision of the treaty may have been inserted in view of the rule of constitutional law that compensation for land taken in condemnation proceedings need not be paid for in advance, provided some impartial tribunal is secured before whom claims may be presented, and may have been inserted, therefore, in order to secure the continuous presence of such an impartial tribunal."

Therefore, I repeat that the impartial tribunal provided for by the treaty having been secured, and the treaty expressly providing that "no part of the work of said Canal * * * shall be prevented, delayed, or impeded by or pending such proceedings to ascertain such damages," that the property holders of the Canal Zone are afforded their legal remedy and that they are not deprived of due process of law by a failure to make compensation to them in advance of the taking, but that their rights are secured by the privilege of appearing before said Joint Commission. Furthermore, it appears in the complaint in this case that the complainants leased the property in question on June 2, 1911, from the Bracho family. This was long after the promulgation of the treaty, and parties leasing or purchasing property and making improvements thereon must, in contemplation of law, have been familiar with the provisions of the treaty referred to.

As to the provisions of Act Number 21 of the Laws of the Canal Zone, providing a method of expropriation proceedings in cases where the United States or the government of the Canal Zone may desire to condemn certain private property for public uses it must be said that this law was enacted by the Isthmian Canal Commission on December 30, 1904, and it evidently had reference to property which had not theretofore been considered or declared necessary for Canal purposes. But it can not have a superior force or binding effect over the Panama Canal Act which provides that all property within the Canal Zone may be declared necessary for Canal purposes, and that the title thereto shall be secured in the United States and compensation therefor fixed and paid *in the manner provided in the aforesaid treaty with the Republic of Panama*. In the consideration of this case we must be guided by the provision of the Panama Canal Act of August 24, 1912, the provision of the Executive Order of the President of December 5, 1912, and by the provisions of the treaty, and in so doing it clearly appears that the plaintiffs are not entitled to the injunction herein prayed for, and that the defendant's plea to the jurisdiction, and the motion to dismiss the bill of complaint, must be and are hereby granted.

[NOTE]. See *Dixon vs. Goethals*, 221 Fed., 1021, and *Reina vs. Bracho*, 256 Fed., 834.

McEWEN *versus* NEVILLE.

(District Court, Canal Zone, Balboa Division, September 10, 1915.)

Civil No. 51.

1. EMPLOYER AND EMPLOYEE. SUIT FOR WAGES. ACCOUNTING. OFFSET.

Where an employee sues his employer for wages and the evidence shows the employee has received some cash from his employer *held*,

- 1st. It will be presumed, in the absence of a showing to the contrary, that such cash payments were to be applied on wages, and the same will be applied accordingly.
- 2d. The employee can not offset against such cash payments accounts of certain merchants for goods properly chargeable to the employer without showing that the employee has paid such accounts.

Attorneys for plaintiff, *V.E. Bruno*.

Attorney for defendant, *Fabrega and Arias*.

JACKSON, District Judge. This action is one for wages wherein the plaintiff seeks to recover from the defendant the sum of \$411.59 United States currency on account of wages and commissions due him in connection with services rendered on the defendant's farm at La Chorrera in the Republic of Panama. In the sum of \$411.59 was included in the complaint a demand for \$193.20 by way of commissions estimated at 20 per cent of the amount of the product reaped and sold from the defendant's said farm. However, at the trial of the case the claim for commissions was abandoned and the action proceeded as one for wages at the rate of \$28 per month from May 1, 1914, to January 1, 1915. The defendant denies all indebtedness on his part to the plaintiff, and, on the contrary, claims that there is due him, the defendant, from the plaintiff, the sum of about \$500 United States currency on account of the fraudulent manner in which the plaintiff kept the accounts, and particularly the accounts relating to certain tradespeople from whom goods were purchased presumably for the use of the farm.

The evidence revealed the fact that in April, 1911, the plaintiff and defendant entered into a verbal contract by which the plaintiff was to take over the management of the defendant's plantation at La Chorrera, and for the services of himself, his wife and son, he was to receive \$28 per month. However, it seems to have been assumed that the \$28 per month would be derived from the sale of the produce of the farm. In the conduct of the management of the farm the plaintiff opened accounts with several tradespeople in Chorrera, among them several Chinese merchants, from whom the plaintiff bought and charged as against the defendant from time to time many articles presumably intended for the use of the plantation. However, a careful investigation of these accounts with the Chinese merchants, aided by the evidence adduced at the trial, has convinced me that many of the articles purchased were not intended for the use of the farm but for the plaintiff's own personal use. There are items purchased from one Chinese merchant in the sum of \$31 and charged against the defendant which appear particularly and unmistakably to have been for the sole personal use of the plaintiff. The evidence also discloses that there were many outstanding bills as against the defendant which the plaintiff

claims were obligations for which the defendant should respond to him, the plaintiff, but as these outstanding accounts were not paid by the plaintiff it is difficult to see how they can be considered as an obligation against the defendant and in his favor.

It further appears that from June to, and inclusive of, October, 1914, the plaintiff received from defendant the following sums of money: In June, \$50 United States currency, in July, \$210 United States currency, in August, \$50 United States currency, in September, \$80 United States currency, in October, \$80 United States currency, and that in September he derived from the sale of oranges the sum of \$22 United States currency; making in all a total of \$492 United States currency. The contract of employment between the plaintiff and defendant was such that plaintiff would be presumed to have received his salary out of these cash payments made to him by the defendant and out of the sale of the proceeds of the farm unless a contrary showing is made to appear. However, the plaintiff does not account in a satisfactory manner for the cash sums received by him from the defendant so as to preclude the presumption that they were sufficient to pay his salary after defraying the other expenses of the plantation. The attempt on the part of the plaintiff to offset, as against this, certain outstanding bills of certain tradespeople is not sustained because of the fact, in the first place, as before stated, many of the articles purchased seem to have been for the personal use and benefit of the plaintiff alone, and also because the outstanding bills have not been paid by the plaintiff but, on the contrary, constitute outstanding obligations directly against the defendant.

In other words, a careful consideration and investigation of the accounts fail to sustain, by a preponderance of the evidence, that there remains due the plaintiff any sum by way of wages or otherwise. The defendant is, therefore, entitled to judgment herein, dismissing the action of the plaintiff, and to his costs.

GOVERNMENT *versus* FAJARDO.

(District Court, Canal Zone, Balboa Division, October 21, 1915.)

Criminal No. 324.

1. JURISDICTION.

Under Section 34, Laws of the Canal Zone, where any part of the crime is committed in the Canal Zone, the courts of the Canal Zone have jurisdiction to try the defendant charged with such crime.

2. CONSPIRACY.

Where Miller and Fajardo were jointly charged with conspiracy to defraud, and separate trials were demanded, and Fajardo was first tried and convicted but upon the trial of Miller he was found not guilty. *Held*, that Miller having been

found not guilty of the crime of conspiracy, there could be no legal justification for the conviction of Fajardo for the crime of conspiracy, and that such a state of facts required the granting of a new trial.

Attorney for plaintiff, *Dr. H. Arias*.

Attorney for defendant, *Charles R. Williams*, District Attorney.

JACKSON, District Judge. The defendant Fajardo was charged jointly with one J. C. Miller with conspiracy to defraud the Government of Colombia through its Postal Agent, Eduardo Espinosa Guzman, and was also charged jointly with Miller with forgery in and about the preparation of seven false receipts to be used in the furtherance of the conspiracy of fraudulently obtaining money from said Guzman, and was also charged with having falsely and fraudulently obtained money from said Guzman by false and fraudulent representations in seven different sums of money, each of which constitutes a separate information. The jury rendered a verdict of guilty as against the said defendant Fajardo on the charge of conspiracy and on the seven charges of obtaining money under false pretenses, and a verdict of not guilty on the seven charges of forgery. The facts in the case show that the money in question was obtained in the Republic of Panama, and that the verbal, false, and fraudulent representations were made in the Republic of Panama. The basis of the claim of an offense having been committed contrary to the peace and dignity of the Canal Zone was predicated upon Section 34 of the Criminal Laws of the Canal Zone as follows:

The following persons are liable to prosecution and punishment—first—all persons who commit in whole or in part any crime within the jurisdiction of the courts.

The only part of the offense of obtaining money under false pretenses, claimed to have been committed in the Canal Zone, was the fraudulent preparation and presentation therein to Miller of the false receipts in question. It is, however, claimed that the conspiracy was entered into between Miller and Fajardo in the Canal Zone and that the other act in furtherance of the conspiracy, namely, the preparation and the signing and stamping with the seal of the Panama Railroad Company, was done at Balboa in the Canal Zone. While Fajardo has been found guilty of conspiracy in the Canal Zone, another jury called on to try the case of conspiracy as against Miller has found him not guilty. It must, therefore, be apparent to any one, so far at least as the charge of conspiracy is concerned, that there has somewhere been a miscarriage of justice for it is impossible, on the face of things and in the very nature of the charge of conspiracy, that Fajardo should be guilty of conspiring with Miller and Miller not guilty of conspiring with Fajardo; or, to put it the other way, it is irreconcilable and impossible that Miller should be not guilty of conspiring with Fajardo and still that

Fajardo should be guilty of conspiring with Miller. Upon the face of it, to let one go free on said charge of conspiracy and to punish the other therefor would seem to present a glaring instance of injustice. It is possible that such finding might be attributed to local or racial prejudices which, with due regard to the friendship existing between the American people and the Republic of Panama, ought so far as possible to be avoided.

Furthermore, the acquittal of Miller rests substantially, if not wholly, upon the defense that no false receipts were presented to him by Fajardo in the Canal Zone, but that the receipts presented to him, Miller, by Fajardo in the Canal Zone were all regular and proper upon their face, and that they must necessarily have been altered, not in the Canal Zone, but within the Republic of Panama. This was the defense as to three of the receipts in question. As to the other four of the receipts the defense was that Miller signed the same in blank in the Canal Zone honestly, without conspiring with Fajardo, and with no intention to defraud, but that thereafter Fajardo must have made false entries upon the face of said blank receipts, not in the Canal Zone but in the Republic of Panama. This was the theory of the defense advanced by Miller, and it was upon a substantiation of this defense that the jury found Miller not guilty. If, therefore, the facts be as the jury in the Miller case have undoubtedly found them it must follow that no part whatever of the offenses charged against Fajardo was committed within the Canal Zone, but that every element, including the false raising or the false entering of figures on the receipts, together with the verbal representations, the obtaining of the money thereon, was committed within the Republic of Panama, in which case it must follow necessarily that no offense was committed contrary to the peace and dignity of the Canal Zone. Furthermore, the foreman of the jury in the Miller case, in announcing his verdict, stated that it was the opinion of this jury that no offense had been committed in the Canal Zone. It must also be borne in mind that the facts adduced by Miller in support of his defense were not adduced in the trial of Fajardo, principally because Miller did not testify in the Fajardo case, nor could he have been compelled to testify.

It has seemed to me that the facts developed at the trial of the Miller case, with the resulting verdict of not guilty, which disclose such an inconsistency as to the verdict of guilty rendered against Fajardo, are such that, in furtherance of justice, and in the exercise of the discretion lodged with the court, the defendant Fajardo should be given the opportunity of another trial at which all the facts looking to the important question of the jurisdiction of this court may be more fully and clearly gone into and considered. It is, therefore, ordered that the verdicts of guilty herein be set aside and a new trial granted.

BECKFORD *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division, October 27, 1915.)

Civil No. 53.

1. DISTRICT COURT. ENTRY OF DECISIONS.

Under the provisions of Section 126 of the Code of Civil Procedure, it is not necessary that the court shall file a written decision, but it is the duty of the clerk to enter the decision on the record.

2. PERSONAL INJURY. EXCESSIVE DAMAGES.

Where the plaintiff, 47 years of age, was run over by an engine operated negligently by the defendant, and the plaintiff's arm was cut off near the shoulder and other severe injuries received which caused him to remain in the hospital for five months, and which produced great physical and mental pain and suffering, a verdict of \$2,500 is not excessive.

3. MASTER AND SERVANT. NEGLIGENCE. CONTRIBUTORY NEGLIGENCE.

The plaintiff was employed by defendant, and under its instruction was engaged in repairing its track. The engine which caused his injuries was in charge of an engineer and fireman. The engineer and fireman did not see the plaintiff on the track although they had unobstructed view of the track for over 900 feet before the engine reached the plaintiff. The plaintiff had his back to this approaching engine and a train of empty dump cars was passing him on a parallel track at the time and he did not hear the ringing of the bell on the engine which caused the injury, nor was he expecting an engine or train from the direction from which the engine in question came. *Held* (first) that the defendant was guilty of negligence; (second) that the plaintiff was not guilty of contributory negligence; (third) that it was the duty of the defendant to keep a lookout for and give a warning to the employees of the company engaged in repairing tracks.

Affirmed by Circuit Court of Appeals, 231 Fed. 436.

Attorneys for plaintiff, *W. C. Todd* and *V. G. De Suze*.

Attorneys for defendant, *C. R. Williams*, *F. Fewille*, and *W. F. Van Dame*.

JACKSON, District Judge. At the trial of this case, on the 6th day of October, 1915, without a jury, the court, after hearing the evidence and the arguments of counsel, rendered an oral opinion finding for the plaintiff and awarding damages in the sum of \$2,500. The finding of the court was, under the circumstances, equivalent to a verdict of a jury.

The defendant asks a new trial upon substantially three grounds:

1st, that the court did not, at the time of finding for the plaintiff, file written findings of fact and conclusions of law;

2d, that the verdict of \$2,500 is not supported by the evidence inasmuch as plaintiff's life expectancy was not established by the introduction of mortuary tables showing the life expectancy, and

3d, that the evidence failed to show that the defendant was guilty of negligence, but on the contrary established contributory negligence on the part of the plaintiff.

As to the first proposition, Section 126 of the Code of Civil Procedure of the Canal Zone provides as follows:

"Upon the trial of a question of fact, the decision must be entered on the record by the clerk."

It will be noted that this does not require that the trial judge shall in all cases file a written decision, but merely that the decision must be entered on the record by the clerk. There was a rule of the Supreme Court requiring the decisions of that Court to be in writing, but there was never a rule to this effect as regards the decisions of the judges of the Circuit Courts. It may be further said that even at the time when there were three judges of the Circuit Courts upon the Canal Zone, it was not the custom or practice of Circuit judges to render written decisions in all cases, nor was it ever considered that there was such a legal requirement. Section 126 herein referred to does not so require and in that respect it differs from the Code of Civil Procedure of the State of California which does specifically require the decisions to be in writing.

It may be further stated that at the time of the rendition of the opinion and the entry of the verdict herein, no demand or request for a written opinion was made by the attorneys for defendant and also that thereafter, viz: On November 6th at the special instance and request of defendants, and as a special favor and accommodation to them, the findings of fact and conclusions of law were reduced to writing and filed, to which exceptions were noted on behalf of the defendant. It would therefore seem that although there was no legal requirement for written findings by the court, nevertheless, in this particular case the same was done.

As to the defendant's contention that the damages are excessive because no mortuary tables were offered in evidence showing plaintiff's life expectancy, the evidence showed that plaintiff's left arm was cut off at the shoulder, that he has been unable to do manual labor since the time of the accident, and that his permanent earning capacity has been diminished. Considering the diminution in plaintiff's earning capacity and the physical and mental pain and suffering, the verdict of \$2,500 was rendered. In this I fail to find any grounds for granting a new trial.

The Supreme Court of the Canal Zone in *McKenzie vs. McClintic-Marshall Construction Co.*, 2 C. Z. Rep., page 181, held as follows:

But the loss of a member of the human body would naturally raise a presumption of a diminution of earning capacity as a result thereof, so much so that no specific allegation thereof would seem to be necessary in the pleading in order to predicate a claim for recovery thereon. This is the result of human experience to such an extent

that no specific allegation nor specific proof thereof need be alleged or made. The loss of an eye is such that a court or jury in assessing damages may be entitled to consider diminution of earning capacity as a result thereof, and in so doing may reasonably consider the party's age, habits, condition in life, and present earning capacity.

In the McKenzie case it was also specifically held, following a previous decision in the case of Fitzpatrick *vs.* Panama Railroad Company, that physical and mental pain and suffering might properly be considered as elements of damage. The Court in that respect said:

"Moreover, it must be said that the plaintiff was undoubtedly entitled to recover for pain and suffering; and the loss of an eye under the circumstances detailed in the evidence at the trial below must certainly have caused the most excruciating pain and suffering, mental and physical."

Therefore, the Supreme Court, in the McKenzie case, in the absence of any specific evidence as to any financial loss whatsoever, increased the verdict of the trial court from \$500 to \$1,200 for the loss of an eye of a colored employee of the McClintic-Marshall Construction Co. I am therefore of the opinion that the verdict of \$2,500 in this case was moderate and considerably less than ordinarily awarded by juries for the same injuries in the States.

As to the grounds of the finding of the court at the trial on the question of the negligence of the defendant, I have since examined with considerable care the case of Aerkfetz *vs.* Humphreys, *et al.*, 145 U. S., 758, strongly relied upon by counsel for defendant, and I find many important points of dissimilarity between the Aerkfetz case and the case at bar. In the first place it appears in the Aerkfetz case that the trial court directed a verdict for the defendants on the ground of the contributory negligence of the plaintiff, and on appeal by the plaintiff below to the Supreme Court, it was held there was no error in so doing. It is true that the Supreme Court in examining the decision of the court below stated that it rested its judgment of affirmance upon the grounds that under the circumstances there was no negligence on the part of defendants and that the accident occurred through a lack of proper attention on the part of plaintiff. But, it may be stated, that the first proposition was not necessary to the decision of the case because as the law then stood, prior to the enactment of the Federal Employers' Liability Act, contributory negligence on the part of a plaintiff constituted a complete defense. Furthermore, the facts appear to differ materially from those in the present case. It appears that in the Aerkfetz case the accident occurred in a crowded railroad yard in Detroit where there were 12 tracks or side tracks used for the making-up of trains, that the plaintiff, a track laborer, was struck by cars which were being pushed ahead by a switch engine along the track upon which Aerkfetz was at work, the speed of the engine being about that of a man walking. And in passing upon the question of defendant's negligence the Supreme Court said:

"It can not be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

Wherein lies a material distinction from the facts of the present case. There were no cars ahead of the engine which struck plaintiff Beckford. It was not necessary to send a man ahead for the sake of giving notice to Beckford. The engineer and fireman had an unobstructed view of plaintiff working on the track with his back toward the approaching engine for a distance of over 900 feet. Notwithstanding which, they failed to give any warning signal of the approach of the train, and too, notwithstanding the fact that there was a train passing on the opposite track which prevented plaintiff Beckford from hearing the ordinary ringing of the bell of the approaching engine. Furthermore, in the Aerkfetz case, the Supreme Court said that the ringing of bells and the sounding of warning whistles of trains in that crowded switch yard, "would have simply tended to confusion." In the case at bar the danger signals in the way of a warning whistle would not, in my opinion, have tended to confusion but would have duly and properly advised plaintiff of the approaching danger.

But aside from the distinctions herein noted, there is the all important distinction that the Aerkfetz case was decided in 1892 prior to the enactment of the Federal Employers' Liability Act, and contributory negligence was a complete defense to an action, and moreover the trend of recent decisions is to hold the defendant more strictly to the obligation to respond in damages to its employees for injuries resulting in any manner from the negligence of the employer. And as bearing upon the duty resting upon the railway company to protect its employees at work upon a track, it has frequently been held, especially in more recent decisions, that "a Railroad Company owes a lookout duty to give warning of the approach of trains to those engaged in repairing its tracks." (Ill. Cent. R. R. Co. *vs.* Murphy (Ky.) 11 L. R. A. ns 352.)

In this case the Court further said:

"These considerations impose upon the railway company, with peculiar force, the duty of giving them warning upon the approach of a train or engine, by the use of audible signals; and by checking and stopping the train or engine in time to avoid injuring them, if the engineer perceives for any reason that they are not paying attention to those signals. As a general rule it is not contributory negligence, as a matter of law for a person so employed not to be on a constant lookout for approaching trains."

The doctrine is very clearly and forcibly stated in the case of Gary *vs.* So. Ry. Co. (N. C. 83 S. E. 849), as follows:

It is not a sufficient defense of the negligence of the defendant that the engineer could not have stopped the train in time to avoid the death of plaintiff's intestate, after he perceived him on the track. *The question is whether the engineer could have stopped the train in time to have avoided killing the deceased after he could have perceived the danger of the deceased, had the engineer and the fireman been in the exercise of proper diligence on the lookout.*

In fact I find numerous recent decisions of courts tending to sustain this general proposition of law; and whereas in the present case it was admitted by the engineer and the fireman on the engine in question that they did not see the plaintiff at all and did not know until some time after that plaintiff had been injured, notwithstanding the fact that plaintiff was lawfully at work upon the track, sent there by his superior officer, and was working with his back toward the approaching engine, and that the engineer and fireman could, by the exercise of ordinary care and prudence, have seen the plaintiff so engaged at work upon the track, and have taken measures to prevent the injury, it would seem that on well-established principles of modern decisions the defendant was guilty of negligence and plaintiff entitled to recover.

The motion for new trial is therefore overruled.

DAVIS *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Balboa Division, March 14, 1916.)

Civil No. 48.

1. MALICIOUS PROSECUTION. PROBABLE CAUSE. MALICE.

Plaintiff owned mileage book, good on Panama Railroad. It was presented and train collector tore out mileage for the plaintiff's trip but failed to give him a hat check which was the customary method of indicating that a passenger had paid fare. The train conductor caused the plaintiff to be arrested on board the train for trying to ride without payment of fare under the provisions of Executive Order of May 11, 1911 (E. O. 112). Mileage torn from plaintiff's book was returned to defendant's auditor within twenty-four hours, so identified that it could be determined therefrom that plaintiff had paid his fare. Four days later the collector of the defendant at its instance filed information under such Executive Order, plaintiff was arrested, tried, and discharged by the magistrate's court. *Held*,

First—that there was lack of probable cause for the prosecution and negligence of the defendant in failing to ascertain from its records that plaintiff had actually paid his fare;

Second—that malice is to be inferred from the existence of facts showing lack of probable cause.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorneys for defendant, *Frank Feuille and Charles R. Williams*.

JACKSON, District Judge. This is an action wherein the plaintiff seeks to recover damages in the sum of \$500 arising out of an alleged illegal arrest and malicious prosecution. The facts alleged in support thereof are substantially that on the 4th of September, 1914, the plaintiff left the City of Panama on a passenger train of the defendant company

at 5.05 in the afternoon for the purpose of going to his home in Pedro Miguel; that prior to entering said train the plaintiff gave to the collector at the gate from his mileage book a slip for eight miles of transportation which represented the transit from Panama to Pedro Miguel, but that he did not receive from the said collector a hat check; that notwithstanding the fact that the plaintiff thus paid his fare from Panama to Pedro Miguel, the collector of the defendant company accused the plaintiff of attempting to steal a ride and delivered said plaintiff over to the train guard on said train, an officer of the Zone police, and that the said train guard kept the plaintiff in custody, and delivered him to an officer of the Zone police in Pedro Miguel. That the plaintiff was obliged to furnish bond for his appearance in the magistrate's court at Ancon, and that four days thereafter, to-wit: On the 8th day of September, 1914, the said collector of the Panama Railroad Company made an affidavit in the magistrate's court, charging that the plaintiff herein "did wilfully and unlawfully fail and refuse to pay 1st class transportation on board passenger train No. 8, northbound between Corozal and Pedro Miguel," and that the plaintiff was, therefore, guilty of violating Executive Order No. 38. This said Executive Order, promulgated May 11, 1911, provides that "any person who shall board any passenger, freight or other railway train in the Canal Zone *
* * with intent to obtain a free ride on such train, however short the distance, without the consent of the person or persons in charge thereof, shall be guilty of a misdemeanor, and shall be punished by fine of not less than \$5 nor more than \$20."

Upon the hearing of the case in the magistrate's court the Judge of said court did thereupon dismiss the case as to the defendant in said action and ordered his bond canceled.

The answer of the defendant is in substance a general denial.

The facts established conclusively show that the plaintiff tendered a mileage book at the gate of the Panama Railroad station in the City of Panama on the afternoon of September 4, 1914, and that the ticket collector at the gate tore out an 8 mile slip from the plaintiff's said mileage book, but, by some inadvertence, he was not given a hat check representing the payment of his transportation in accordance with the prevailing custom. Whether this failure with regard to the hat check was the result of negligence on the part of the collector or of the plaintiff, or of both, does not clearly appear. But it does appear that the plaintiff's mileage book bore his name and check number, and that on each mile slip of the mileage transportation was printed a certain number that corresponded to the number of the plaintiff's book. It also appears that after the taking of the mileage from mileage books they are turned in to the Auditor of the Panama Railroad Company; that this is invariably done within 24 hours after the taking up of such mileage,

and that after such time it can readily be ascertained from the records in the auditor's office whether or not passage has been paid from a certain mileage book between certain designated points on the Panama Railroad on any particular day. Nevertheless, after the arrest of the plaintiff at Pedro Miguel on September 4, on the charge of attempting to steal a ride in violation of the provisions of Executive Order No. 38 hereinbefore referred to, with the facts in the possession of the defendant company and therefore available to the collector of the company by the exercise of ordinary diligence, the said collector 4 days thereafter, on the 8th of September, made the affidavit in question and preferred the formal charge against the plaintiff, and the prosecution proceeded with the result that the plaintiff was compelled to and did establish his innocence and was dismissed by the magistrate.

It must be conceded that if the plaintiff did not have in his possession a hat check or other evidence of having paid his fare (and it would seem that the mere possession of the mileage book did not of itself constitute sufficient evidence of this fact), that the defendant company would clearly be entitled to demand the payment of fare, and that in case of refusal so to pay that he could be ejected from the train, possibly with the right thereafter on the part of the ejected passenger to sue for return of the fare paid and breach of contract. This has been held in numerous cases. In the case of *Hall vs. the Memphis, etc., Railroad Co.*, 15 Federal Reporter, page 62, it was held that one whose transportation had been adjusted with the station agent of the company, but which was not so done in the form required by the company's rules could be ejected from the train upon failure to pay the regular fare when so demanded by the conductor, and that if it afterwards appeared that the fare had been wrongfully demanded the party ejected could recover back the same with costs and all damages sustained.

So in the case of the *Little Rock Railroad Co. vs. Goerner*, 80 Arkansas, page 158, it was held: "A street car passenger who is given an invalid transfer check upon paying his fare and asking for a transfer, to which he is entitled, can not, upon refusal by the conductor of the connecting car to honor it, refuse to pay his fare, thereby rendering necessary forcible ejection, and hold the carrier liable for the assault. But his remedy is confined to damages for the breach of contract, including reasonable compensation for the indignity put upon him through the fault of the company"

Also in the case of *McKay vs. Ohio R. R. Co.*, 9 L. R. A., page 132, it was held as follows:

A railroad conductor may demand a ticket as evidence of a passenger's right of passage, or on failure to produce it may demand payment of the fare, and on failure to pay it may lawfully eject the passenger from the train, using no more force than necessary.

This may be considered as established and, moreover, as a sound principle of law.

However, another question enters into the present case, about which there was some confusion and not a very clear understanding at the trial of this case, and that is the arrest and subsequent prosecution of the plaintiff. Conceding the right of the defendant company, through its collector, to demand fare of the plaintiff, who did not have at the time proper evidence of the payment thereof, and of its right to eject him from the train for failure to pay, did the defendant company four days thereafter have the right to press a criminal charge against the plaintiff when it had in its possession the evidence showing undoubtedly that there was no foundation in fact for such criminal charge. This proposition and that of the right to demand fare and eject from the train at the time are quite distinct. In the case of *Reisterer vs. Lee Sum*, 94 Federal Reporter, 343, decided by the District Court of Appeals in New York, it was held that although there might be sufficient facts justifying an immigration officer to cause the original arrest of a party, that, nevertheless, if there were facts in the office of the Collector of New York showing that the arrest was unjustified the party would be liable in damages for the subsequent prosecution of the case. In that case the court said:

With no other evidential facts that the plaintiff was an offender, a just consideration for his rights demanded some effort by the defendant to verify his suspicions. It must be presumed that a duplicate of the photograph was on file with a copy of the certificate with the collector at New York; yet the defendant did not attempt to procure a comparison of the two. Nor, so far as appears, did he make the slightest effort to get information about the antecedents of the plaintiff. We can not doubt that the case justified the conclusion that the defendant acted hastily and overzealously in making the arrest, and allowed his suspicion to overmaster the discretion and judgment which he ought to have exercised.

And so in *Sutherland on Damages*, Vol. 4, pages 3584-5, it is stated:

A mere honest belief in guilt is not enough; it must be founded upon reasonable grounds. For though he have belief and yet act negligently and irrationally, the prosecution may not have probable cause. The test then is not exclusively limited to the actual knowledge of the defendant in fact, but may be put to any knowledge which he could or ought to have gained in the exercise of ordinary prudence and caution.

This the court thinks correctly states the rule of law, and applying this to the case at bar it must be held that the knowledge of the facts upon which the plaintiff was prosecuted was exclusively in the possession of the defendant company, and by the exercise of ordinary prudence and diligence it could have been ascertained at any time during the four days that elapsed between the arrest of the defendant on September 4 and the filing of the affidavit and the prosecution of the case against him on September 8. The defendant company through its agent should have advised itself of the existence of the facts within its possession before continuing the prosecution of the case, for otherwise

it would be to reverse the well-known principle of law that the accused must be presumed innocent until proven guilty, and that the burden of establishing the guilt is upon the prosecution and not upon the accused.

In the Am. & Eng. Enc. of Law, Vol. 14, page 25, it is stated:

It is universally held that a criminal proceeding having been brought or prosecuted maliciously and without probable cause, affords when terminated the basis of an action of malicious prosecution against the one so bringing or prosecuting such proceeding.

In fact, there are numerous cases holding that the continuance of a prosecution after the original arrest, when the party instituting the same could, with reasonable diligence, have ascertained the facts showing the innocence of the accused, constitutes the basis for an action of malicious prosecution.

And likewise in numerous cases it has been held that the discharge of the plaintiff by the committing magistrate is *prima facie* evidence of want of probable cause and sufficient to throw upon the defendant the burden of proving the contrary. Also, that while malice and want of probable cause must concur to entitle plaintiff to recover malice need not be proven affirmatively, but it may be inferred from the want of probable cause.

Bornholdt v. Souillard, 36 La., 103.

Hall v. Acklen, 9 La., 219.

Brown v. Vittier, 47 La., 607.

Whaling v. Wells, 50 La., 564.

So in the case at bar it may be said that there was justification for ejecting the plaintiff from the train, and even that there was probable cause for the original arrest of the plaintiff, but it can not be said that with all of the evidence in the possession of the defendant there was probable cause for the continuance of the prosecution 4 days thereafter; and from the absence of such probable cause malice, as a matter of law, is to be assumed. It, therefore, follows that in the present case there are established the four elements necessary to constitute an action for malicious prosecution, namely: (1st) the arrest; (2d) the discharge by the committing magistrate, which raises the *prima facie* presumption; (3d) the want of probable cause, and (4th) the resulting malice as a legal consequence.

In this connection the following language of the court of appeals in the case of Reisterer vs. Lee Sum is particularly in point:

But the defendant was responsible for the arrest, and for putting in motion the criminal proceeding which subjected the plaintiff to imprisonment and compelled him to establish his innocence; and he can not escape the consequences because, as it turned out, there was a stronger case against the plaintiff when he was put on trial before the commissioner than there was when the proceedings were initiated.

In an action for malicious prosecution the jury are at liberty to infer malice from facts that establish want of probable cause. It was not necessary, therefore, for the plaintiff to prove that the defendant was actuated by any personal ill will toward him in instituting the criminal proceeding.

As to the measure of damages the following elements should be taken into consideration, namely: The humiliation to which the plaintiff was subjected by the arrest and his subsequent trial upon a criminal charge; the expense of going to Balboa to defend himself, his loss of time, and the fact that the odium of the existence of such a charge against an honest person is naturally embarrassing.

Under all the circumstances the court considers the plaintiff is entitled to recover herein the sum of three hundred (\$300) dollars with his costs, and a verdict therefor may accordingly be entered.

BULGARES *versus* BEST.

(District Court, Canal Zone, Cristobal Division, April 3, 1916.)

Civil No. 119.

1. MALICIOUS PROSECUTION.

In a case for malicious prosecution the plaintiff must establish (first) the arrest; (second), discharge by the court; (third), want of probable cause, and (fourth), malice.

2. MALICIOUS PROSECUTION. PROBABLE CAUSE.

Discharge by the magistrate's court in this case *held* to establish *prima facie* case of want of probable cause.

3. MALICIOUS PROSECUTION. PROBABLE CAUSE. MALICE.

Malice may be inferred and found from want of probable cause.

Attorney for plaintiff, *William C. MacIntyre*.

Attorney for defendant, *V.G. De Suze*.

JACKSON, District Judge. This case comes into this court on appeal from the Magistrate's court wherein plaintiff recovered a judgment against the defendant in the sum of \$300 and costs. The action was one for malicious prosecution arising out of the suit of Ernest Best against John Bulgares, referred to in the opinion of the court therein.

In said civil suit the said defendant Best caused the arrest and prosecution of the said John Bulgares upon the allegation that the said Bulgares was indebted to the said Best in the sum of \$100 arising upon contract, and that the said Bulgares was about to depart from the Canal Zone with the intent to defraud his creditors. The evidence adduced at the trial would indicate that the plaintiff was not only arrested, but subjected to a long, vexatious, harrassing and costly trial,

which finally resulted in his acquittal and discharge. As before stated, upon a hearing of the case, the magistrate, having all the facts and circumstances before him, and fresh in his mind, awarded a judgment of \$300 in favor of Bulgares and against Best.

Upon the trial of the case in this court on appeal, being one for malicious prosecution, the plaintiff is compelled to establish the existence of four essential facts in order to recover: (1st) the arrest; (2d) the discharge by the magistrate (which fact has frequently been held to raise a *prima facie* case); (3d) want of probable cause; and (4th) malice, which may be inferred from the lack of probable cause.

The arrest, with all of the consequent inconveniences, damages, and harrassments, has been abundantly established; also the acquittal and discharge in the magistrate's court; and in an opinion recently rendered by this court in the case of Davis against the Panama Railroad Company numerous authorities were cited showing that such discharge makes a *prima facie* case of malicious prosecution, placing the burden upon the defendant. Furthermore, the special facts and circumstances would tend to show that even if Bulgares owed Best the sum of \$100 (which we have found he did not), the special facts of the case would show that the grounds upon which his arrest were ordered were without probable cause and unjustified. There seems to have been no justification for the criminal proceedings taken by the defendant, Best, against the plaintiff, Bulgares, in the civil case pending in the magistrate's court. From this, as a matter of law, malice is legally inferred. Therefore, under all the facts and circumstances I see no reason for disagreeing with the judgment of the court below, and it must, therefore, follow that the plaintiff is entitled to judgment against the defendant in the sum of three hundred dollars (\$300), and costs herein.

DIEZ *versus* SCHUBER.

(District Court, Canal Zone, Balboa Division, May 24, 1916.)

Civil No. 40.

1. FOREIGN JUDGMENTS. *RES JUDICATA* COMITY.

Partnership matters between plaintiff and defendant were litigated in the courts of the Republic of Panama, resulting in judgment there in favor of defendant and against plaintiff for \$282.55, silver. This suit is brought for recovery of sums claimed by plaintiff as a result of the partnership transactions. Defendant pleaded judgment rendered in the Republic of Panama as *res judicata*, and it is *Held*,

1. That in view of the fact, as shown by the evidence, the Panama courts give conclusive effect to judgments of the Canal Zone, that comity requires that a like effect be given in our courts to judgments of the courts of the Republic of Panama. (This decision in effect overrules prior decision on demurrer in this case. 3 C. Z. Report).

2. That all matter litigated, or which might have been litigated, between the parties in the action in the courts of the Republic of Panama are *res judicata*.

Attorney for plaintiff, *Wm. H. Carrington*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. In the opinion of the court heretofore filed herein, overruling the plea of *res judicata*, it was stated as follows:

It is insisted by the plaintiff that the litigation in the Republic of Panama did not necessarily, or in fact, involve the same questions as are here presented for determination; but a careful reading of the judgments of the Panamanian courts has led me to the contrary conclusion for it would seem that in the Panamanian courts all questions arising out of the liquidation of the alleged partnership between the parties passed in review before those courts, or at least that each party thereto had his day in court as to all questions that might possibly arise out of the liquidation of the said contract which is the basis of the present suit. I am therefore led to conclude that substantially the same questions were involved in the Panamanian courts as are here presented for determination.

It will be recalled that defendant Schuber recovered from plaintiff Diez in the municipal court of the City of Panama the sum of \$282.55 Panamanian silver, which judgment was afterwards appealed to the Circuit Court for the First Circuit of Panama, and said appeal was there dismissed for not being properly presented. Therefore, the judgment of the Panamanian court is final and conclusive as to all questions there litigated between the parties. It was, however, held that the judgment of the Panamanian court was not conclusive in this court as to the rights of the parties, the court relying for its decision upon the case of *Hilton vs. Guyot*, 159 U. S., 113, in which the Supreme Court of the United States held as follows:

In the absence of statute or treaty, the comity of this country does not require that judgments of a foreign country be recognized as conclusive in this country, where such foreign country does not give like effect to our own judgments.

The court adopted the rule laid down in *Hilton vs. Guyot* upon the statement and showing then made that the Panamanian courts did not in all cases give full force and effect to the judgments of the courts of the Canal Zone, but that causes of action which had been determined here could be, and in fact were, readjudicated in the Panamanian courts in actions brought therein. However, upon the present trial of the case, in which the defense of *res judicata*, is again relied upon, the evidence demonstrates very clearly and conclusively that the courts of Panama do give full force and effect to the judgments of this court, and that they likewise issue executory orders or executions on such judgments. There is to this effect the testimony of Judge Pinillo, and Dr. Ayarza, a former justice of the Supreme Court of the Republic of Panama. It must, therefore, follow that when foreign countries do

give full force and effect to the judgments of our courts the comity of our country requires that the judgments of such foreign countries be recognized as conclusive in our courts, and this is all the more so by reason of the close relations that exist, and should exist, between the Canal Zone and the Republic of Panama. It is quite necessary and important that the judgments of the courts of both jurisdictions should be reciprocally recognized, and, as it has been shown that the courts of Panama recognize our judgments, we should reciprocally recognize theirs.

The evidence further shows that the matters in dispute between the two parties in the Panamanian courts were the same, or, at least, as stated in the former opinion herein, that each party had his day in court as to all questions that might arise out of the contractual relation, which was the basis of that suit. It must, therefore, follow that the defendant is entitled to judgment with his costs herein by reason of the prior adjudication of the questions at issue.

Moreover, a careful consideration of the evidence produced at the trial would show that, while there was a contract entered between the parties looking to a partnership for the conduct of the dairy business, and that in pursuance thereof the plaintiff Diez accommodated the defendant Schuber with a loan of money through the International Banking Corporation for the purpose of enabling him to make a trip to the United States, that thereafter the defendant Schuber took up the loan and liquidated the indebtedness from him to Diez, and that the contract of partnership was rescinded by mutual consent, and that whatever losses and expenses were suffered by the plaintiff Diez were properly for his own account, for which there is no legal claim against the defendant Schuber.

Furthermore, the evidence fails to support the allegations of fraud as against the defendant Schuber as reasons conducing to the making of the contract upon which the plaintiff seeks to recover.

It, therefore, follows that the defendant, upon the facts established at the trial as well as the plea of *res judicata*, is entitled to judgment herein with his costs; and it is so Ordered.

JACKSON *versus* SMITH, Auditor.

(District Court, Canal Zone, Balboa Division, July 11, 1916.)

Civil No. 107.

1. MANDAMUS. JURISDICTION. DISTRICT COURT OF CANAL ZONE.

Under the provisions of the Panama Canal Act, Aug. 24, 1912, c. 390, Sec. 8, 37 Stat. 565 (Comp. St. 1916, Sec. 10044), the District Court of the Canal Zone has jurisdiction to issue a peremptory writ of mandamus where a proper case is presented within C. C. P. C. Z., Sec. 552.

2. UNITED STATES. OFFICERS. POWERS AND DUTIES. AUDITOR OF PANAMA CANAL.

Under the Panama Canal Act and the Executive Order of January 27, 1914 (Executive Orders 1904-1915, p. 330), as amplified by that of March 2, 1914 (page 340), promulgated in pursuance thereof and which became a part of the act, the auditor of The Panama Canal is the legal custodian of the funds of the Canal and of the Canal Zone, and is exclusively charged with their disbursement, being required to report only to the President and to Congress.

3. MANDAMUS. AUDITOR OF PANAMA CANAL. DISCRETION.

Where the incumbent of an office in the Canal Zone created by the Panama Canal Act, with a fixed salary, has performed the duties which entitle him to a payment of salary, and Congress has appropriated the money for the same, the duty of the auditor of the Canal to issue a warrant therefor is a ministerial duty, and he has no discretion to withhold such warrant on a claim that the officer is indebted to the United States.

4. UNITED STATES. OFFICERS. AUTHORITY AND POWERS. COMPTROLLER OF TREASURY.

The salary of a judge who has served under an appointment made by authority of an act of Congress, which has also fixed his compensation and appropriated money for its payment, is not a claim against the Government subject to the provisions of the Dockery Act, July 31, 1894, c. 174, Sec. 8, 28 Stat. 207 (Comp. St. 1916, Sec. 425), which authorizes disbursing officers to submit any question involving a payment to be made by them to the Comptroller of the Treasury for decision, but is a demand fixed by the law which no executive officer of the Government has power to withhold or diminish.

5. UNITED STATES. OFFICERS. AUTHORITY AND POWERS. COMPTROLLER OF TREASURY.

Such provision applies only to claims against the Government the validity of which may be questioned by a disbursing officer, and the assertion by him of an unadjudicated cross-claim on behalf of the Government, which he seeks to deduct from the fixed salary of a Federal judge, raises no question which the comptroller is given authority to decide.

6. UNITED STATES. OFFICERS. DUTIES. AUDITOR OF PANAMA CANAL.

The Executive Order of January 27, 1914, as amplified by that of March 2, 1914, promulgated by the President pursuant to express authority given by the Panama Canal Act, is in legal contemplation an integral part of such act, and the duties of the auditor of the Canal therein provided for are statutory, and not merely pertaining to administrative detail.

7. JUDGES. SALARY. AUDITOR OF PANAMA CANAL.

Act Oct. 22, 1913, c. 32, 38 Stat. 209 (Comp. St. 1916, Sec. 423), provides that "the money accounts of The Panama Canal, under the Panama Canal Act * * * shall continue to be audited by the Auditor of the War Department." The Executive Order of January 27, 1914, provided for by the Canal Act, and which put it into effect, provides for an accounting department under the supervision and direction of an auditor on the Isthmus charged with the administrative examination of such accounts as are required to be submitted to the Treasury Department, and "the collection, custody, and disbursement of funds of The Panama Canal and the Canal Zone." The Sundry Civil Appropriation Act (Act March 3, 1915, c. 75, 38 Stat. 883), provided for the payment of the salary of the district judge of the Canal Zone and appropriated money

for the purpose. *Held*, that in so far as there was any conflict between them, the Executive Order superseded the act of October 22, 1913, and that the auditor of the Canal was charged with the duty of auditing and paying the salary of the district judge.

8. MANDAMUS. SUBJECTS AND PURPOSES OF RELIEF. MINISTERIAL ACTS.

Where a plain ministerial duty is imposed on an executive officer, leaving nothing to his judgment or discretion, and he refuses to act under such circumstances, mandamus is appropriate to compel him to perform his duty.

9. UNITED STATES. JURISDICTION OF FEDERAL COURTS. ACTION AGAINST UNITED STATES.

An action for mandamus to compel an official of the United States to do his plain ministerial duty under the laws is not an action against the United States, and is within the jurisdiction of a Federal court.

10. JUDGES. COMPENSATION OF FEDERAL JUDGES. "EMOLUMENTS."

Section 8 of the Panama Canal Act provided that when it was put into effect by Executive Order there should be established in the Canal Zone a district court with a district judge who during his term should reside within the Zone and should receive the same salary as district judges in the United States, and no emoluments except such salary. There are no houses in the Canal Zone except those owned by the Government, nor are others permitted. Those of the Government were built for the use of employees of the Canal and the Panama Railroad Company and other functionaries of the United States, to whom they were furnished without charge except for a period of less than 3 months, during which, by Executive Order, employees of the Canal and railroad were charged a rental. The judges serving during government by the Canal Commission were furnished quarters or houses without charge. *Held*, that the furnishing of a house rent free to the district judge appointed under the Canal Act was not an "emolument" in violation of the act, but a necessary incident to his compliance with his duty to reside in the Zone, and that, in the absence of any law or Executive Order requiring the payment of rent therefor, there was no authority to exact it from him (quoting Words and Phrases, Emoluments).

11. JUDGES. SALARIES OF FEDERAL JUDGES. DEDUCTIONS.

An executive department of the United States has no authority to make a deduction from the salary of a Federal judge, fixed by law and for which an appropriation has been made by Congress, because of a claimed indebtedness from him to the Government. (Affirmed 241 Fed. 747. 246 U. S. 388.)

Attorneys for relator, *Fairman, MacIntyre, Arias, and Ganson.*

Attorney for respondent, *Charles R. Williams*, District Attorney.

CLAYTON, Special District Judge.

OPINION OF THE COURT.

Under the appointment of the President and confirmation by the Senate, William H. Jackson, the relator, duly qualified as district judge of the Canal Zone on May 1, 1914, and has ever since continuously discharged the duties of his office. He became and is entitled to the same salary as that paid a district judge of the United States. (Sec. 8, Act *supra*.)

The relator avers "that the Congress of the United States has heretofore appropriated funds for the payment of the salary of your petitioner, and has appropriated funds for salaries and expenses necessary for the civil government of the Canal Zone, including the expenses of your petitioner herein while engaged in the performance of his official duties, and that the funds appropriated as aforesaid, are now available for the payment of said salary and expenses." And this allegation is admitted by the respondent in his answer to the petition. H. A. A. Smith, the respondent, is the auditor of the Accounting Department of The Panama Canal, and is charged with the collection, custody, and disbursement of funds for The Panama Canal and the Canal Zone, including the funds appropriated by Congress for the relator's salary. The respondent has paid to the relator his salary monthly and from time to time, but now withholds from him of his salary the sum of \$1,131.76 for the payment of the following items of alleged indebtedness to The Panama Canal, namely:

From the salary due the relator for the month of December, 1914, \$170.07, for the rent of residence, house No. 118, Ancon, C. Z., from May 1 to October 17, 1914, 5 months and 17 days at the rate of \$25 per month, and electric current for the same period at the rate of \$5.55 per month; from the salary due the relator for the month of January, 1916, \$66.66, on account of alleged absence for a period of four days during said month of January beyond the six weeks' leave referred to in the Panama Canal Act; from the salary due the relator for the month of March, 1916, \$500, to apply on account of rent for use of residence No. 311, Ancon; from the salary due the relator for the month of April, 1916, \$341.97, alleged balance due for rent of house No. 311, Ancon, to April 30, 1916, and account of one day's alleged absence beyond the six weeks' leave referred to in the Panama Canal Act; and from the salary due the relator for the month of May, 1916, \$53.06 account of rent for house No. 311, Ancon, and electric current; or a total sum of \$1,131.76.

The relator avers that he is not indebted to The Panama Canal or the United States in any sum or sums whatsoever, and denies specifically every item of the above-mentioned claim of indebtedness, and alleges that the before-mentioned sum of \$1,131.76 of his salary is being unlawfully withheld from him by the respondent.

The prayer is that the respondent, the Auditor of The Panama Canal, be compelled by peremptory mandamus to audit, approve, issue and deliver to the relator warrants, vouchers or pay checks for his salary as district judge of the Canal Zone as required by law and practice, without regard to said claim of indebtedness set up by the respondent which, as before stated, is denied by the relator.

The respondent admits the appointment and service of the relator as district judge of the Canal Zone, but he claims that he has the right

and that it is his duty to withhold the said sums described on the ground of the relator's alleged indebtedness for house rent and electric lights, and the sums deducted and withheld on account of five days' alleged absence from the Canal Zone in excess of the six weeks' leave of absence specially provided for in Sec. 8, Act of August 24, 1912.

1. This Act is entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone." It is sometimes referred to as the Panama Canal Act but is commonly called the Adamson Act after its distinguished author.

It is provided in this act:

SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive Order are recognized and confirmed to continue in operation until the courts provided for in this act shall be established.

And it is pertinent to quote the following section of the act:

SEC. 8. That there shall be in the Canal Zone one district court with two divisions, one including Balboa and the other including Cristobal; and one district judge of the said district, who shall hold his court in both divisions at such time as he may designate by order, at least once a month in each division. The rules of practice in such district court shall be prescribed or amended by order of the President. The said district court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' courts. The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same that is exercised by the United States district judges and the United States district courts, and the procedure and practice shall also be the same. The District Court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof. Said judge shall provide for the selection, summoning, serving, and compensation of jurors from among the citizens of the United States, to be subject to jury duty in either division of such district, and a jury shall be had in any criminal case or civil case at law originating in said court on the demand of either party. There shall be a district attorney and a marshal for said district. It shall be the duty of the district attorney to conduct all business, civil and criminal, for the Government, and to advise the Governor of the Panama Canal on all legal questions touching the operation of the Canal and the administration of civil affairs. It shall be the duty of the marshal to execute all process of the court, preserve order therein, and do all things incident to the office of marshal. The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assist-

ant when necessary, who shall receive salaries to be fixed by the President. The district judge shall be entitled to six weeks' leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or otherwise to discharge his duties the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President, and who, during such service, shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding court away from their homes. The district attorney and the marshal shall be paid each a salary of five thousand dollars per annum.

By the reading of this section it is seen that the District Court of the Canal Zone has original jurisdiction in all cases at law involving principal sums exceeding three hundred dollars, and that jurisdiction of all other matters and proceedings not specially provided for in the Act were by the terms of the Act itself retained in the District Court or the judge thereof, including jurisdiction of all matters and proceedings of which the Supreme Court, the Circuit Courts and the District Courts of the Canal Zone had jurisdiction at the time the Adamson Act was passed. And it must be remembered that the Code of Civil Procedure of the Canal Zone was by the authorized order of the President, dated May 1, 1907, made a part of the law governing the Canal Zone; and this too, it will be observed, was continued in force by the Adamson Act. This code provides as follows:

Sec. 552. *Procedure in Mandamus.*—The Supreme Court shall have concurrent jurisdiction with the Circuit Courts in all cases where any inferior tribunal, corporation, board, or person unlawfully neglects the performance of an act which the law specially enjoins as a duty resulting from an office of trust or station, or unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully excluded by such inferior tribunal, corporation, board, or person, and also shall have original jurisdiction over Circuit Courts, and judges thereof wherever said court or judge unlawfully neglects the performance of a duty which the law specifically or specially enjoins as a duty imposed upon such court or judge. The procedure of the Supreme Court in mandamus proceedings shall be the same as those provided for mandate in this code.

Sec. 554. *Preliminary injunctions in certiorari, mandate, prohibition proceedings.*—In *certiorari*, mandamus, and prohibition proceedings an injunction may be granted by any judge of the Supreme Court, if in his judgment such injunction is necessary for the preservation of the rights of the parties pending litigation.

Sec. 555. *Expediting such proceedings.*—The court may, in its discretion, make such orders as it deems necessary for expediting proceedings in petitions for *certiorari*, mandamus, or prohibition proceedings.

Thus we find the District Court of the Canal Zone has jurisdiction in all cases where any inferior tribunal, corporation, board or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office or position of trust, or unlawfully denies to or excludes one entitled to the use and enjoyment of a right or office from the use or enjoyment of such right or office or any right which is unlawfully denied by an inferior tribunal, corporation, board or person.

It was never heretofore contended that the former Circuit and Supreme Courts of the Canal Zone did not have authority to issue a writ of mandamus, or that the District Court as now constituted does not have such power. Manifestly Congress legislated, in passing the Adamson Act, with reference to the Code of Civil Procedure, *supra*, and presumably with knowledge of and reference to proceedings in the Courts, Circuit and Supreme, of the Canal Zone. As now constituted, the jurisdiction and power of the District Court of the Canal Zone was not abridged by the Adamson Act but, on the contrary this Court was invested by the act with all the powers heretofore exercised by the Circuit and Supreme Courts of the Canal Zone. As before said, it must be presumed that Congress knew the power and jurisdiction of such courts and the proceedings had in them, and, on admitted elementary principle, the Act of Congress is to be considered in the light of what was done by and in the Courts of the Canal Zone. Let me refer to some of the adjudged cases.

On page 134, vol. 1, of the published Reports of the Supreme Court of the Canal Zone, case No. 45, decided on September 19, 1908, the Supreme Court held that a writ of mandamus would lie, and in fact issued a writ of mandamus to E. M. Goolsby, Clerk of the Circuit Court of the Second Judicial Circuit.

In Canal Zone, *ex rel.*, Seixas *vs.* Gudger, vol. 2, Canal Zone Supreme Court Reports, p. 89, the Supreme Court of the Canal Zone refused to issue a writ of mandamus, not because it did not have jurisdiction so to do but because the relator in that case sought by mandamus to compel the judge of the Second Circuit Court to grant an appeal when no bill of exceptions had been prepared and presented to him. The closing paragraph of that decision is as follows (1. c. 71):

Since, therefore, the petition herein fails to show, that the relator made any proper attempt to perfect his bill of exceptions and since it also fails to show that the respondent unlawfully neglected the performance of any duty specifically or specially enjoined upon him as acting judge of the Circuit Court for the second Circuit, it is considered by the court that the alternative writ heretofore issued should be quashed, that the stay granted therein should be vacated and the petition dismissed with costs against the relator. It is so ordered.

In Canal Zone, *ex. rel.*, Wm. H. Knox & Co. *vs.* Goolsby, vol. 2, Canal Zone Supreme Court Reports, 64, a peremptory writ of mandamus did issue to the respondent, commanding him to pay to the relator the sum of \$4,434. The syllabus in this case is manifestly erroneous as the body of the decision on page 65 shows that a writ of mandamus did issue.

In Canal Zone, *ex rel.*, Sucre *vs.* Owen, vol. 2, Canal Zone Supreme Court Reports, 66, the Supreme Court refused a writ of mandamus directing a judge of the Circuit Court to sign a bill of exceptions when it appeared that the bill of exceptions was tendered solely for the purpose

of saving an exception taken to a ruling of the court on May 23 overruling a motion to vacate a judgment that had been rendered at the March term. The Supreme Court held that the Circuit Court had lost control over the judgment and was powerless to set aside at the May term of court a judgment rendered at the March term, and that, therefore, even though a bill of exceptions had been signed, it would not have benefitted the party applying for the writ of mandamus. For this reason the writ was refused.

In the case of *Kong Ching Chong vs. Wing Chong*, vol. 2, Canal Zone S. C. Reports, p. 25, 1 c. 29, the Supreme Court in defining the jurisdiction of Circuit Courts in the Canal Zone said as follows:

What is a Circuit Court of the Canal Zone? A court limited in its jurisdiction by the substantive law of Panama? Not so. They are courts of equal plenary jurisdiction with the Court of King's Bench in Great Britain and the Circuit Courts of the States of the Union and the United States. Courts of the highest jurisdiction in the world. Nothing jurisdictional is withheld from them. Over the life, the property, and liberty of the litigants before them they possess all jurisdictional power.

These cases are cited for the purpose of showing that never heretofore was the authority of the Circuit and Supreme Courts of the Canal Zone questioned; and further to show that as a matter of fact writs of mandamus have been issued by these Courts.

As we have said the present District Court of the Canal Zone is vested with all the jurisdiction of the former Circuit and Supreme Courts of the Canal Zone which lawfully exercised the power to issue writs of mandamus.

It is clear that Judge Jackson is entitled to his salary of \$6,000 per annum in monthly payments of \$500 just as in case he were a district judge of the United States. And it appears to be equally clear that the District Court of the Canal Zone has authority to issue a peremptory mandamus if a proper case is presented.

2. Let us now consider whether mandamus can be rightfully issued against the auditor of The Panama Canal. The Adamson Act provides as follows:

Sec. 4. That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive Order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this act. The Governor of the Panama Canal

shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in Continental United States. That upon the completion of the Panama Canal the President shall cause the same to be officially and formally opened for use and operation.

Thereafter, in pursuance to the provisions of section 4 above quoted, under date of January 27, 1914, the President promulgated an Executive Order, sec. 6 of which reads as follows:

6. There shall be an Accounting Department under the supervision and direction of the auditor, with an assistant in the United States. The duties of the department shall include all general bookkeeping, auditing, and accounting, both for money and property, cost keeping, the examination of pay rolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody, and disbursement of funds for The Panama Canal, and the Canal Zone.

These same duties shall be performed for the Panama Railroad Company on the Isthmus when not inconsistent with the charter and by-laws of that Company. The department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the governor, with the approval of the President. The auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete, and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.

The act conferred a very broad power upon the President. It authorized him to "complete, govern and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a Governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone." Of course, such Executive Orders as the President promulgated for the purpose of putting said act into effect became a part of the act itself. Moreover, by its very terms, the act did not become operative until the Executive Order put it into effect. It is plain, therefore, that these Executive Orders are to be interpreted and treated by this court as a part of the Congressional enactment.

It will be observed that section 6 of the Executive Order, *supra*, provided that there should be an auditor, with an assistant in the United States. He was authorized to have charge of the collection, custody, and disbursement of funds for The Panama Canal and the Canal Zone, including all moneys appropriated by Congress for The Panama Canal and the civil government, etc., of the Canal Zone. He was made at once the custodian, the auditor, and disburser of the funds to be expended on the Isthmus.

This Executive Order further provided that the auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete and correct information in regard to the status of appropriations made by Congress, and the status of all other funds and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.

The last sentence of section 6 of the Panama Canal Act, to which this section of the Executive Order refers, is in this language:

Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to Congress.

Now, the person in charge of these funds was the auditor, which position or office was created by the President under the Executive Order above quoted. It is true that the auditor has an assistant in the United States, but he was no more than an assistant there. The auditor in the Canal Zone had charge of the funds and exclusive control over their disbursement. This is manifest from that portion of section 6 of the Panama Canal Act heretofore quoted; and it was necessary for him to make reports monthly to only one department or official, namely, the President, and to make reports annually to only one body, namely, Congress. The Act of Congress and the Executive Orders thereunder placed the auditor of The Panama Canal under the President and the Congress of the United States and under no other official, body, or department.

Again, section 5 of the Executive Order of March 2, 1914, in amplification of section 6 of the Executive Order above-quoted, is in the following language:

Section V. That the assistant auditor provided for in Executive Order No. 1885, dated January 27, 1914, shall be appointed April 1, 1914. His salary shall be fixed by the governor. He shall perform such duties of the Accounting Department to be performed in the United States, as may be assigned to him by the auditor, and also such other duties of a general nature as may be assigned to him by the Chief of the Washington Office of The Panama Canal.

On and after April 1, 1914, there shall be transferred to the assistant auditor, and he shall be charged with the custody, care and preservation of, all records and property of the disbursing officer, and of the assistant examiner of accounts of the Isthmian Canal Commission, with which those officers shall be charged on March 31, 1914.

The Chief of the Washington Office may, however, transfer to and place in the custody of the disbursing clerk, hereinafter provided for, such of the property and records above described, as he may deem to be essential to enable the disbursing clerk to properly perform his duties under this order, but the disbursing clerk shall not be permitted, without specific authority from the Chief of Office, to keep a separate set of records and files. He shall be required to rely upon, and consult when necessary, the records and files in the office of the assistant auditor, in verifying the legality of claims and accounts submitted to him for payment, or to verify the details of any collection for which he is required to account. Disbursements will be made by the disbursing clerk only after examination of the claim or account in the office of the assistant auditor.

Such of the officers and employees employed in the office of the assistant examiner of accounts and the disbursing office of the Isthmian Canal Commission on March 31, 1914, as the governor determines to retain, shall be transferred to and employed in the Accounting Department in the United States, and their salaries fixed at such amounts as the governor deems just and reasonable.

There shall be a disbursing clerk for that part of the Accounting Department in the United States, who shall perform similar duties to those that are required to be performed by the collector and paymaster on the Isthmus, in so far as there are such duties to be performed in the United States, and shall be subject to the same supervision by the assistant auditor, as the collector and paymaster on the Isthmus are by the auditor. He shall give bond in such amount as may be fixed by the governor, or by his authority.

Such of the officers and employees as are transferred to and employed in the Accounting Department in the United States, shall be distributed between the office of the assistant auditor and that of the disbursing clerk, respectively, as the needs of the service require. They shall perform such duties as may be assigned to them by proper authority. They shall be subject to similar financial responsibilities, and to the same general rules and regulations that have been prescribed for like officers and employees in the Accounting Department on the Isthmus.

It is the purpose of this order, and it shall be construed, as to require the assistant auditor of the Panama Canal to examine all claims and accounts before their payment by the disbursing clerk; to carry on all general correspondence in relation to claims and accounts required to be conducted by the Accounting Department in the United States; to prepare all vouchers and certify to the validity of all claims and accounts before they are submitted to the disbursing clerk for payment; to furnish to the disbursing clerk all necessary data to enable that officer to make reply to any exceptions that may be taken to his account by the Auditor for the War Department; to keep all general records to be kept in the Accounting Department in the United States; to make all reports as to statistical data required to be sent to the auditor on the Isthmus; to give an administrative examination to all accounts of the disbursing clerk before they are transmitted to the auditor; to make an administrative examination of all claims which are to be submitted to the auditor for direct settlement; to keep a complete record of all collections to be made and all moneys received by the disbursing clerk; to certify to the correctness of the disbursing clerk's accounts for collections; to see that bills collectible are issued and collections made in all proper cases; to have charge of all general files which are required to be kept by the Accounting Department in the United States; and to perform such other duties as may be assigned to him by the auditor, or the Chief of the Washington Office.

The Executive Order of March 2 above quoted is as much the law as the Act of Congress or the Executive Order of January 27 hereinbefore referred to. It is an enlargement or explanation of section 6 of

the order of January 27. It clearly defines the duties and functions of the assistant auditor and conclusively shows that such assistant in the United States is under the direction of the auditor on the Isthmus, who is the final auditor. And it will be observed this section last quoted states that the disbursing clerk under the assistant auditor in Washington shall be subject to the same supervision by the assistant auditor as the collector and paymaster on the Isthmus are by the auditor. It is plain that this section accentuates the fact that the assistant auditor at Washington is under the supervision of the auditor on the Isthmus, and this assistant is specifically directed to report to such auditor.

It seems that nothing further need be said to demonstrate that this auditor, the respondent in this case, is the final auditor. But he is more than an auditor because by the very provisions of the Executive Order creating his office he not only audits but he orders the disbursement of all funds for the language of the act charges him with the disbursement of the funds. It is a reasonable and consistent interpretation to say that the Executive Order shows that the disbursing clerks and paymasters under the assistant auditor in Washington and under the auditor on the Isthmus, the final auditor, are no more than pay clerks who are required to pay the vouchers as they have been audited by the assistant auditor in Washington, and by the auditor on the Isthmus who is vested with the power of disbursement.

It seems to be incontrovertible that the two provisions of the two Executive Orders above quoted, one putting the Canal Act into operation, and the other amplifying and explaining the terms of the first order, are as much a part of the Panama Canal Act itself as if these two sections had been embraced in the act. I think the conclusion necessarily follows that the respondent is the final auditor so far as Judge Jackson's salary is concerned.

And I think also that it is not to be doubted that the auditor, under the provisions of the Canal Act, needs only to report to the President and to Congress. It is not believed if it had been the intention of Congress that the final auditor should be in Washington, and that the auditor on the Isthmus should be under some other official, that the office of assistant auditor would have been created whereby the assistant at Washington is to act under the auditor on the Isthmus. It is entirely consistent to say that The Panama Canal maintains what may be termed a branch office at Washington with the assistant auditor there to audit the accounts of that branch office; and as a part of his duty under section 5 of the Executive Order of March 2, 1914, he is required to send data to the auditor on the Isthmus and to transmit the examination of accounts to the auditor on the Isthmus.

Recurring to the duties of the auditor of The Panama Canal, it is to be borne in mind that under the Adamson Act and Executive Orders in pursuance thereof he is charged with "the collection, custody, and disbursement of funds for The Panama Canal and the Canal Zone" as I have attempted to show. (Sec. 4 of the Adamson Act, and sec. 6, Executive Order, January 27, 1914, *supra*.) And in the so-called Sundry Civil Act of March 3, 1915 (Stat. at L., 63d Cong., 3d S., 883-840), the appropriation is made for expenditures requisite for and incident to the construction, maintenance, and operation, sanitation, and civil government of the Panama Canal, and Canal Zone, including the following: Compensation of all officials and employees * * * and for such other expenses not in the United States, as, * * * necessary to best promote the construction, maintenance, operation, sanitation, and civil government of the Panama Canal, * * * as follows: * * * For civil government of the Panama Canal and Canal Zone, salaries of the district judge \$6,000, district attorney \$5,000, and marshal \$5,000, etc.

It is seen that expenses not in the United States, including the civil government of the Panama Canal, embrace the specific sum of \$6,000 appropriated by the Act of Congress for the payment of the salary of the district judge, up to June 30, 1916. It is my opinion that in legal contemplation this fund is on the Isthmus and is subject to disbursement there under the direct authority of the auditor of The Panama Canal; who must report with reference thereto to the President and to the Congress, and who is not otherwise required to report.

Under the law and the practice obtaining in the Canal Zone in such case it is the duty of the auditor to make and deliver the pay voucher to relator for his salary at the end of each month, and under the same law and practice it is the duty of the paymaster, who is no more than a paying teller of the respondent, to pay the salary upon the certificate or voucher of the auditor there. Nothing is left to the judgment or discretion of the auditor in the matter of such disbursement. He is required to perform a ministerial duty and no more.

3. In his answer the respondent says that he has sought the advice of the Comptroller of the Treasury under the following provision of the Dockery Act (R. S., Vol. 2, 1892-1901, p. 216, Act of July 31, 1894):

Disbursing officers, or the head of any executive department or other establishment not under any of the executive departments may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them.

And he insists that the comptroller has rendered a decision against Judge Jackson that precludes any action by this court.

Now the only question involved in the payment of the judge's salary is the one raised by the respondent who withholds \$1,131.76 of the

salary where the services and identity of Judge Jackson are admitted. The pleadings in the case and the briefs submitted by counsel in behalf of the respondent, as well as the testimony and oral argument, show that the respondent did not submit to the comptroller a question of payment to be made by him as auditor. But, rather, that he did submit to the comptroller the question as to whether or not he as auditor had the right to retain portions of the relator's salary for the satisfaction of alleged indebtedness of relator to the United States or The Panama Canal.

The relator's salary does not fall under the category of a claim against the United States. It is fixed compensation earned by him and for which a specific appropriation has been made and the manner of disbursement provided for. It requires no argument to show that the case at bar is different from one where a claim is made against the United States and judgment and discretion is vested in an accounting officer authorized by law to adjust and settle the claim. In such case as that the Comptroller of the Treasury shall upon application render his decision upon any question involving a payment to be made.

Here the salary was ascertained or fixed by law and the money for its payment appropriated by Congress as before stated. In legal effect it was on the Canal Zone, or in the hands or under the control of the disbursing officer, who is the respondent here. There was nothing left to the judgment or discretion of the respondent whose duty it was to disburse the money appropriated for the salary. Being satisfied of the identity of Judge Jackson it was the plain duty of the respondent to issue his warrant for the salary.

The salary of a judge who has served and for whose compensation specific appropriation has been made is not such a claim that affords any field for the operation of the Dockery Act. We are not without a guiding precedent. In the case of *Benedict vs. U. S.*, 176 U. S., 357-361, it was said:

The case in reality turns upon the meaning of the word "salary," as used in section 714. The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending upon the time, and not upon the amount, of services rendered * * * as applied to district judges in general, and, indeed, to every district judge except the judge of the Eastern District of New York, it doubtless refers to the salary of five thousand dollars fixed by the Act of February 24, 1891.

Such salary is an annual stipend payable in sickness as well as in health, for duties much more onerous in some districts than in others, and regardless of the fact whether such duties are performed by the judge in person, or by the judge of another district called in to take his place. It is a compensation which can not be diminished during the continuance of the incumbent in office, and of which he can not be deprived except by death, resignation, or impeachment.

There the Supreme Court of the United States distinctly declared that a Federal judge can not be deprived of his salary in whole or in

part except by death, resignation or impeachment. Of course, the appointment and qualification of a territorial judge who did not act as such but was removed from office by Executive Order would not entitle him to a salary. That was the case in *U. S. vs. Guthrie*, 17 How. 284, 302-34, which is hereinafter considered and differentiated from the present case.

If the judge can be deprived of a part of his salary for alleged indebtedness for house rent when such rental charge was fixed arbitrarily, that is to say, without his consent and without any authority of law, such charge could by the same token or assumed authority have been made \$500 per month, and thus so adjusted as to absorb the entire salary of the judge. I do not think that such a conclusion would be more absurd than the contention of the respondent that how much of and for what purpose he can withhold the salary of the Judge, is a matter entirely in the judgment and discretion of the respondent; and that his action in such matter can not be reviewed by a court. There can not be such an autocrat.

Our Government can not be reduced to a bureaucracy. Chief Justice Marshall said that the Government of the United States has been emphatically termed a government of laws and not of men; and it is emphatically the province and duty of the judicial department to say what the law is. *Marbury vs. Madison*, 1 Cranch, l. c. 165 and 177. And as pertinent here it may be added that the judicial department must be allowed to continue to adjudge in cases involving personal and property rights.

It was asserted by counsel for respondent that the salary of the judge was a claim or demand against the United States and that the amount alleged to be due by relator to The Panama Canal by way of house rent was a claim or demand against the relator and that, therefore, the auditor acted within the provisions of that section of the Dockery Act above-quoted in submitting this matter to the comptroller. But as I have said, it was a disputed claim merely because of the fact that the auditor, the respondent in this case, had made it so. It can not be said that the salary of the judge constituted a claim disputed or otherwise prior to the time that the respondent in this case saw fit to so assume. Furthermore, the Dockery Act provides that the auditor may submit to the Comptroller of the Treasury a question involving a payment to be made by the auditor. This was no question of a payment to be made from government funds by the auditor to a party asserting a right to such funds. It is a question of the auditor retaining from a Federal judge, whose salary had been provided for and appropriated by Congress, such amounts as he saw fit to withhold. The claim in dispute was not against the Government; it was against the relator. The act does not provide, and clearly never contemplated that the

auditor should arrogate to himself the right to even consider that any amount by way of claim or otherwise could be deducted from the salary of a Federal judge based upon an alleged claim asserted by officials of the Government.

Under this Dockery Act, therefore, this alleged claim was improperly submitted to the Comptroller of the Treasury by the respondent. It seems to me that the Comptroller of the Treasury should have advised the auditor when he submitted the alleged claim that he, the comptroller, had no authority to pass upon it. The law confers no such function upon the comptroller nor upon the auditor. Consequently, the opinion of the Comptroller of the Treasury was extra-official, was not required by law, and constituted purely a gratuitous act of the respondent in this case in furtherance of his endeavor to unlawfully withhold relator's salary from him. The contention of the counsel for respondent that this court is without jurisdiction to issue the writ of mandamus because the Comptroller of the Treasury had "judicially decided the question" is, I think, untenable.

4. I do not think that there is any merit in the respondent's contention that he performs his duty under administrative organization and not under statutory organization. When the Congress passed the Panama Canal Act of August 24, 1912, and authorized the President to put it into operation when he deemed it expedient, and further authorized him to create such offices as he deemed necessary to provide for the sanitation and civil government of the Canal Zone, when the President, acting under the express authority of Congress, by Executive Order of January 27, 1914, created an Accounting Department under the supervision and direction of the auditor, who is the respondent; and when Congress later, in March, 1915, appropriated money to pay this relator's salary of \$6,000 per annum to June 30, 1916, and provided that it be paid on the Isthmus, it thereby became the duty of this auditor, created in pursuance of the statute, to audit and pay the salary as Congress had directed in the Adamson Act and the Sundry Civil Appropriation Act of March 3, 1915.

It is not to be doubted that the Executive Orders of January 27 and March 2, 1914, are in legal contemplation integral parts of the Panama Canal Act itself and these and the Appropriation Act of March, 1915, appropriating the funds to pay the relator's salary on the Isthmus, are binding law compelling upon the respondent. In legal appreciation the respondent's office was created by statute; that is, by order in pursuance of a statute, which has all the effect of a statute, and that thereby his duties are clearly defined.

5. The respondent contends that the Auditor of the War Department is the proper party against whom this relator should proceed, and predicates his contention upon this provision of the Act of Congress approved October 22, 1913:

The money accounts of The Panama Canal, under the Panama Canal Act of August 24, 1912 (Stat. at L., vol. 37, p. 560), shall continue to be audited by the Auditor for the War Department.

It must be conceded that this statement is general and that, on the other hand, specific authority is given by the Executive Order of the President of the United States to the auditor on the Isthmus to audit and disburse all funds appropriated by Congress in connection with The Panama Canal.

I do not think that there is necessarily any conflict between the the provision last above quoted and the Executive Orders promulgated under the Adamson Act. It is clear that prior to October 22, 1913, the Auditor of the War Department had never audited the salary of the district judge for the simple reason that the office of district judge was not created until the Panama Canal Act was put in force and effect by the Executive Order of the President in 1914. The office was created on April 1, 1914, and the present incumbent was confirmed by the Senate and received his commission as district judge on May 1, 1914. Consequently, whatever other accounts the Auditor for the War Department may have audited prior to October 22, 1913, he could not have audited the salary of the district judge of the Canal Zone, there then being no district judge, and, therefore, no salary of such officer to audit. The quotation from the act of October 22, 1913, states that the money accounts of The Panama Canal shall continue to be audited by the Auditor for the War Department. The salary of this relator is a new account which never existed and, consequently, did not need to be audited until after the promulgation of the Executive Orders of January 27, and March 2, 1914, creating the Accounting Department on the Isthmus, making the respondent in this case the final auditor, and defining the duties of certain of his subordinates both on the Canal Zone and at Washington. I find no law making it incumbent upon the Auditor of the War Department to audit the salary of this relator, and there is nothing to show that in the absence of statutory authority, this official had any authority to pass upon or to audit such salary.

And, again, when the Sundry Civil Appropriation Bill of March 3, 1913, providing for the payment of the salary of the relator, and appropriating the amount thereof, and directing its payment, was passed, the fund for the payment of the judge's salary was placed under the control of the auditor on the Isthmus. Congress knew when this act making the appropriation for the judge's salary was passed, that in January and in March, 1914, the President had created the office of auditor on the Isthmian Canal, with an assistant at Washington, and that this law and the Executive Orders in pursuance thereof specifically defined the power and authority that was vested in the auditor on the Isthmus, and in his assistant at Washington. Furthermore, when

Congress made this appropriation for the payment of the salary of the district judge it was done almost two years after the act of October 22, 1913. If the latter act could ever have had the meaning attributed to it by the respondent, the subsequent act of Congress, enacted presumably with the knowledge and approval of the two Executive Orders referred to, destroys the force of the provisions of the act of October 22, 1913, as insisted upon by the respondent. It follows that when Congress in March, 1915, appropriated the amount of relator's salary that had been previously fixed by the Adamson Act of August 24, 1912, Congress knew the provisions of the act of October 22, 1913, and also knew in making the appropriation for relator's salary, it would be paid pursuant to the Executive Orders hereinbefore set forth.

It is familiar law that repeal by implication is not favored and it is a recognized canon that where two acts are in apparent conflict they must be so construed, if possible, as that they shall consist or harmonize with each other. And as a corollary the rule is that when two legislative provisions are in seeming conflict, the one being vague and general, and the other clear and specific, the latter will control; and, further, that if separate fields can be found for the operation of the two seemingly conflicting provisions, then, in such way, must the apparent hostility between the two provisions be reconciled and each allowed to operate in its own particular field.

6. The respondent contends that this relator should seek a mandamus against the Auditor for the War Department at Washington. Were he to do so it seems to me such auditor would answer that the Adamson Act and the Executive Orders of January and March, 1914, and the Appropriation Act of March, 1915, placing the funds for the payment of the relator's salary under the control of this respondent, would preclude this relator from having any remedy against him. I believe that such contention would be fatal to relator's case there.

The respondent further suggests that Judge Jackson can resort to the Court of Claims for the vindication of his rights. That court passes upon disputed claims, and whenever a judgment is rendered there it is the duty of Congress to appropriate money for its payment. Probably that tribunal would hold that demand for the payment of Judge Jackson's salary could not be a claim triable there; that it is not a claim but a compensation fixed by law, for which payment is provided for by an existing appropriation. *Benedict vs. U. S., infra.*

7. The rules of law governing mandamus against a public officer are well settled. The difficulty is making the proper application of the law in a particular case. Where a plain ministerial duty is imposed upon an executive officer—such a duty as leaves nothing to be determined according to his judgment and discretion—and he refuses to act under such circumstances, mandamus is appropriate to compel him to per-

form his duty. This is, of course, a principle universally recognized.

I think the misunderstanding in this case is attributable to a misconception of the law. Some time a too free use of cyclopedias and digests is resorted to, and too little real study is devoted to adjudged cases cited. It must be understood that no stricture is intended upon the counsel who made the oral argument for the respondent, for he, the district attorney, presented his own well-prepared brief and has demeaned himself altogether as a thoughtful and competent lawyer.

The numerous cases cited in the briefs for the respondent may be divided into two classes: 1, cases where the Supreme Court held that executive officers could not be compelled by mandamus to act in matters which had been left to their judgment or discretion. Illustrative of this principle is *U. S. vs. Lamont*, 155 U. S., 303-310, where Mr. Justice White (now the Chief Justice), in the opinion of the court, said:

Much was said in argument at bar upon the question of when a contract is to be regarded as completed, under the circumstances here presented, and the discussion concerning the authority of the Secretary of War to review the action of an officer of engineers in such a case and to direct a new adjudication, has taken a wide range. We deem the consideration of both these points unnecessary in view of the relator's bids under the second advertisement and specifications, and his contract to do the work at a less price and under new conditions. It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty which is merely discretionary. This doctrine was clearly and fully set forth by Chief Justice Marshall in *Marbury vs. Madison*, 5 U. S. 1 Cranch, 137 (2:30), and has since been many times reasserted, by this court. See *Kendall vs. Stokes*, 44 U. S. 3 How, 87 (11:5060); *Brahear vs. Mason*, 47 U. S. 6 How. 92 (12:357); *Reeside vs. Walker*, 52 U. S. 11 How. 272 (13:693); *Holloway vs. Whitelay*, 71 U. S. 17 How. 225, 231 (15:226;228); *United States vs. Edmunds*, 72 U. S. 5 Wall. 563 (18:692); *Gaines vs. Thompson*, 74 U. S. 7 Wall. 347 (19:62); *Cox vs. United States*, 76 U. S. 9 Wall. 298 (19:579); *United States vs. Schurz*, 102 U. S. 378 (26:167); *Butterworth vs. United States*, 112 U. S. 30 (28-656); *United States vs. Black*, 126 U. S. 40 (32:354); *Brownsville Taxing Dist. vs. League*, 129 U. S. 493 (32:760); *Noble vs. Union River Logging R. Co.* 147 U. S. 165 (37:123).

The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus in the case of *ex parte Rowland*, 104 U. S. 604 (26:861), this court, speaking through Mr. Chief Justice White, said: "It is settled that more can not be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one."

Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act (*Kentucky vs. Boutwell*, 80 U. S. 13 Wall. 256 20:631), but it must require the act to be done. "A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do" (*Reeside vs. Walker*, 52 U. S. 11 How. 272 (13:693); see also *Cox vs. United States*, 76 U. S. 9 Wall. 298 (19:579), and the duty must be "clear and indisputable," *Knox County Comrs. vs. Aspinwall*, 65 U. S. 24 How. 376.

And 2, cases where plain ministerial duty was enjoined upon executive officers and mandamus was used to compel its performance.

Illustrative of this principle is *Roberts vs. U.S., ex rel., Valentine* (176 U. S. 221) where Mr. Justice Peckham, for the Court, said:

The writ was refused in the *Black* case, because, as the Court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction, and the effect which the later acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the Court said, would not be controlled by mandamus. The circumstances under which a party has the right to the writ are examined in the course of the opinion, which was delivered by Mr. Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within the meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

This case comes within the exception stated in the *Black* case, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the Court will not interfere with executive officers of the Government in the exercise of their ordinary official duties, even those whose duties require an interpretation of the law, the Court having no appellate power for that purpose. On this last ground the Court denied the writ.

Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand.

The judgment of the Court of Appeals must be affirmed.

The respondent cites a number of cases to sustain his assertion that mandamus will not lie in this case. He contends that this is an action against the auditor in such official capacity as he may have, and is in effect an action against the United States, and cites *United States vs. Guthrie, Secretary of the Treasury*, 17 How., 284, 302-34. Of course that case has been many times cited with approval by the Supreme Court of the United States. The principle was correctly applied there to the facts, but the case can not be a precedent here to support the respondent's contention.

There the relator Goodrich, on March 19, 1849, was duly commissioned Chief Justice of the Supreme Court of the Territory of Minnesota at a compensation of \$1,800 a year, payable quarterly. The tenure of his office was four years. After having received his lawful compensation for the time he had served the relator was informed on October 22, 1851, by the Acting Secretary of State that the President had removed him from office and had appointed in his place Jerome Fuller. After the 4 years from the date of his commission had expired the relator preferred a claim before the First Auditor of the Treasury for the sum of \$2,343 as compensation for the period that had elapsed from the date that he was removed from office to the termination of the 4-year period. The claim was rejected for the reason that there was no appropriation to pay his salary, and that the amount of the salary had been paid to Fuller who had fulfilled the duties of the office, and that the auditor and comptroller were bound to consider the removal of the relator and appointment of Fuller as legal and continuing. The Supreme Court affirmed the ruling of the Circuit Court in dismissing the application for the writ of mandamus upon the grounds that there is no power in the Circuit Court or in the Supreme Court to command the withdrawal of moneys from the United States Treasury to be applied in satisfaction of disputed claims against the United States; that no appropriation had ever been made to pay the salary of the relator, but that the appropriation had been made to pay the salary of the subsequent appointee of the President, who filled the office from which the relator had been removed; and that the acts of the auditor, the comptroller, and the Secretary of the Treasury in passing upon the claim were discretionary and *quasi* judicial and that they were not merely ministerial, and that, therefore the court had no power to mandamus these officials.

The principle announced as governing that decision has no application to the case at bar for the two cases are so different in essential particulars. A statement of these differences and further comment seem to be unnecessary. It is hardly necessary to add that the proceeding here is not an action against the United States but is an action to compel an official of the United States to do his plain ministerial duty under the laws of the United States.

The respondent cites *U. S. vs. Lynch*, 137 U. S. 280. In that case the relator was ordered in March, 1872, by his superior officer to proceed from Philadelphia to New York and thence by Pacific Mail to Colon, cross the Isthmus of Panama, and thence to Mare Island, California, and report for duty on board the U. S. S. *Lackawanna*. Relator was a naval officer. He traveled 88 miles overland from Philadelphia to New York and some thousands of miles outside of the United States. He claimed that he was entitled to be paid 10 cents a mile for the full number of miles traveled. The respondent, the Fourth Auditor, and the Second Comptroller of the Treasury, answered that the relator had been paid 10 cents a mile for the total number of miles traveled in the United States, and his traveling expenses while traveling outside of the United States. It was found that for a number of years the Navy and Treasury Departments, had, with but a single exception, held that the 10 cents a mile did not apply to travel to, from, or in foreign countries but only to travel in the United States. This had long been the interpretation of the statute by the auditor and the comptroller. The relator sought to compel these officials by mandamus to interpret the statute differently from the way they had theretofore construed it—to compel them not only to exercise a discretionary or quasi judicial act but to exercise it in his favor. There the relator had at most a claim against the United States for money expended by him. No act had appropriated any money for him that was available and withheld by the respondents. The Court of Claims was the proper forum in which the relator in that case should have sought vindication for his claim if he had any proper claim.

The case of *Reeside vs. Walker*, 11 Howard 290, is relied on by the respondent. There Reeside had certain postoffice contracts with the Government of the United States. Alleging that he had been overpaid thereon suit against him was brought in the Circuit Court of the United States for the Southern District of Pennsylvania for the recovery of the sum of \$32,709.62, the amount alleged to have been overpaid. Defendant filed a general demurrer and a counterclaim, and on trial being had a verdict was returned finding that the plaintiff was indebted to the defendant for \$188,496.06. On May 12, 1842, the transcript of the record bore the following entry: "Motion for new trial overruled; new trial refused and judgment on the verdict, copy of assignment, etc., filed."

Later the executrix of defendant sought to compel the Secretary of the Treasury, by mandamus, to enter on the books of the Treasury Department to the credit of the deceased the sum of \$188,496.06, and to pay the same to the relator as executrix of the deceased. The Supreme Court refused to grant the writ for the reasons: That from the record no judgment appeared to have been given for the amount

of the verdict; the relator failed to show the entry of a judgment; and that the verdict of the jury merely laid the foundation for a *scire facias* to issue and a hearing to be had on that if desired.

The Court said that "The petitioner and her husband have neglected to pursue the case in that way to the final judgment, and, hence, have offered no evidence of one, of the verdict of indebtedness to Reeside by the United States." On these two points the Court acted, and the rest of the case is merely *obiter dicta*. It was further stated, however, that there was no appropriation of Congress to pay the claim and that it was "a well known Constitutional provision that no money can be taken or drawn from the public treasury except upon an appropriation by Congress."

The respondent refers to the *United States vs. Bank*, 104 U. S., 733, as a supporting authority. That case was an appeal from the Court of Claims. The bank had paid certain taxes and afterwards discovered that \$972.69 was wrongfully exacted and paid. It then sought the refund of that amount. The Commissioner of Internal Revenue and the Secretary of the Treasury approved the payment of the claim and the commissioner certified its allowance. Payment was refused by the officers of the Treasury. The Court of Claims decided in favor of claimant and against the United States, and the Supreme Court sustained this ruling. There is nothing more to that case.

United States vs. Kaufman, 96 U. S., 369, is cited by the respondent as an authority. That was an appeal from the Court of Claims, which had held that it had jurisdiction of a suit to recover an excess amount paid by way of special tax, and that an allowance of the claim by the Commissioner of Internal Revenue was sufficient, and that the court did not need to go behind the allowance and find the facts in respect to the original claim. The Supreme Court of the United States sustained that decision.

It will be noted that although the four cases above cited laid down general principles of law which are well recognized they have absolutely no analogy to the case now under consideration.

Buchanan vs. Alexander, 4th How., 20, is cited by the respondent to sustain the proposition that money in the hands of a disbursing officer is money in the Treasury of the United States and can not be reached by attachment or other process. In that case seamen of the frigate *Constitution* were indebted to boarding house keepers in Norfolk, Va. They sought to attach the wages of these seamen in the hands of the purser of the vessel. The Supreme Court held that the money was not subject to attachment. In the case at bar no one corresponds to the boarding house keeper, no one to the seamen, and no one to the purser, and no writ of attachment is sought. The respondent contends that the principle recognized in *Mississippi vs. First Comptroller of*

the Treasury, Durham (4th Mackay, 235), is applicable here. I am unable to examine this case as the report in which it is published is not to be had on the Zone. The respondent gives in his brief the following purported excerpt from the opinion:

That a court must not permit the United States to be sued by a mandamus directed to one of its officers where it could not be sued directly unless by its own consent under some special statute allowing it. Now it does not require the argument to manifest that a refusal by an officer of the Treasury Department whose general duty under the law is to allow and take steps to issue a warrant for the payment of any claim, is a refusal of the claim by the United States for the time being; that a mandamus against him to compel the allowance and payment thereof, is a suit against the United States, and that it is none the less a suit against the United States because the ground or notices of refusal to allow may be obviously and notoriously without legal justification. In other words, that no error of judgment or capriciousness of conduct can destroy, for the time being, the quality of agent and actor in the name and on behalf of the Government of the proper Treasury official in disallowing the claim of any State or individual for money due or alleged to be owing by the United States.

I fail to see what bearing that decision has upon the instant case, for Judge Jackson's salary is not a claim and there is no dispute in respect to the payment of the same except that which arises from the denial of the authority of the auditor to withhold a part of the ascertained and fixed salary. I have dealt with this phase of the case in another part of this opinion.

Louisiana *vs.* McAdoo, 234 U. S., 627, is cited by the respondent. In that case the State of Louisiana, through its Attorney General, sought to obtain permission to file a petition against the Secretary of the Treasury and the Assistant Secretary of the Treasury in order to review their official judgment as to the rate of duty to be exacted under various tariff acts. In that case the Court said that if the State of Louisiana, as a producer of sugar, could review the action of the Secretary of the Treasury in determining the rate to be collected on Cuban sugar, any consumer, though not an importer, might make a similar complaint if in his judgment the Secretary of the Treasury exacted a higher rate than justified by the law, thereby enhancing the price he must pay in the market upon the imported articles which he used. The Court held that it was an attempt to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be demanded under his construction of the tariff act, and that such suits would operate to disturb the whole revenue system of the Government, and affect the revenues which arise therefrom. Furthermore, it was stated that such a suit would obviously be one against the United States as such.

The respondent cites United States, *ex rel.*, Goldberg *vs.* Daniels, 231 U. S., 218. That was a petition for mandamus, praying that the Secretary of the Navy be directed to deliver the U. S. cruiser *Boston* to the

petitioner. It was asserted that the petitioner had bid more than the appraised value of the ship which, after survey, condemnation and appraisal, had been stricken from the naval registry under the act of August 5, 1902, and proposals for the purchase of which the Secretary of the Navy had advertised. After the petitioner sent his certified check to the Secretary of the Navy, the Secretary refused to deliver the vessel and returned the check. The answer admitted the fact, and set up that the bid was not the acceptance of an offer but was only an offer in itself subject to be accepted or not, at the discretion of the Secretary, and that the Secretary never accepted the petitioner's bid, the Government having decided to lend a cruiser to the Governor of Oregon for use by the naval militia of that State. The petition was refused by the court below on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids even though they satisfied all the conditions prescribed. This judgment was affirmed.

In *Ness vs. Fisher*, 223 U. S., 638, referred to by respondent, the Secretary of the Interior refused to accept, as conforming to the Timber and Stone Act of June 3, 1878, an application to purchase under that act 160 acres of public land in the Roseberg Oregon Land District. The relator sought to compel the Secretary of the Interior to accept his application. It had been refused by the Secretary of the Interior who ruled that the application was objectionable in that it was made upon information and belief and not upon personal knowledge; that it was in fact for cultivation and valuable chiefly for its timber, and that it was uninhabited and contained no mining or other improvements. The Court said that it was confronted with the question, not whether the decision of the secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, could be reviewed by mandamus and he be compelled to retract it and to give effect to another finding, not his own and not having his approval. Manifestly the Court of Appeals was right in its refusal to issue the writ of mandamus, and the Supreme Court sustained the ruling.

In *Champion Lumber Co. vs. Fisher*, 227 U. S., 445, on the respondent's brief, the petitioner sought to compel the Secretary of the Interior and the Commissioner of the General Land Office, by writ of mandamus, to issue a patent for lands. It seems that the commissioner and the Secretary of the Interior were advised by an agent, whom they had appointed to investigate, that flagrant fraud had been committed, and they were requested to withhold patents to the lands. Thereupon the commissioner directed the Registrar and Receiver, Jackson, to suspend action on commutations and proofs until further investigation. It was further shown by the report of another special agent that the

entry had been made for speculative purposes with no attempt to comply with the requirements of the law, and the recommendation was made that the entry be canceled on the ground of nonremedy, noncultivation, nonimprovement, and abandonment. The commissioner directed that a hearing be had. Petitioner moved for a stay of proceedings, and claimed that his entry should be patented without further proceedings. The motion was denied by the commissioner, and this denial overruled by the Secretary of the Interior who later denied a motion to review his decision, finding that a protest had been filed against the patent within two years from the issuance of the receiver's receipt, and holding that the case should proceed to hearing on the special agent's charge. The petitioner then sought relief in the court, praying that the commissioner and the Secretary of the Interior be directed by mandamus to issue the patent as heretofore stated.

The court held that this was an attempt to coerce the Secretary of the Interior in the exercise of his lawful discretion and judgment. It was said: "The case was, therefore, submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record." The petitioner did not challenge nor did the Court pass upon the validity of an authority exercised, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute, the Dockery Act. This case was ultimately decided on the ground of jurisdiction; that the petition for the writ of error should be denied. The Supreme Court held that the case was not one that was appealable to that court under the fifth clause, section 250, of the Judicial Code, and, by way of *Obiter*, that the action of the Secretary of the Interior was wholly discretionary and, therefore, not subject to review by mandamus.

In *Oregon vs. Hitchcock*, 202 U. S., cited by respondent, the Supreme Court held that the immunity of the United States from suit prevented a State from maintaining in the Supreme Court of the United States a suit against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from allotting and patenting in severalty swamp lands within the limit of an Indian reservation. The Court further said that it could not interfere with the allotment and patenting by the Land Department of swamp lands within the limits of an Indian reservation while the legal title was still in the Federal Government. In that case the Court stated:

Now the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale—to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment, and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit

is one against the State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.

The case was decided against the relator on the ground that the court had no jurisdiction as it was manifestly a suit directly against the United States to seek to restrain it from selling lands that belonged to it; that the court would not interfere with the Land Department in its administration; and that until the legal title to lands passes from the Government inquiry as to equitable rights comes within the cognizance of the Land Department. The Court stated that it could not anticipate the action of the Land Department, or take upon itself the administration of the land grants of the United States.

Again the respondent says that:

The courts will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law. *Dunlap vs. Black*, Commissioner of Pensions, 128 U. S. 40.

In that case the Commissioner of Pensions adopted an interpretation of the law adverse to relator by refusing a pension certificate, and his decision was confirmed by the Secretary of the Interior. The Court stated that it had no right to review such decision. It declined to interfere by mandamus with the Executive Orders of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, but held that when executive officers refuse to act in a case at all, or when by special statute or otherwise, a mere ministerial duty is imposed upon them, which they were bound to perform without further question, then, if they have refused to act, a mandamus might be issued to compel them. In that case the Commissioner of Pensions and the Secretary of the Interior acted in the discharge of a *quasi* judicial function. This paragraph from the opinion of the court is sufficient to show that it has no bearing in this case:

Adjudged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by the signature to the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts.

The respondent cites the case of *Schillinger, et al., vs. the United States*. That was an appeal from a judgment of the Court of Claims,

dismissing a suit brought by plaintiff against the United States to recover damages for the wrongful use of a patent for improvement in concrete pavement. It was nothing more nor less than an action in tort against the United States. The Supreme Court held that the Court of Claims was correct in deciding that it had no jurisdiction of a tort action against the United States, and that without its consent the United States could not be sued.

8. The respondent insists that the relator is indebted to the United States or the Canal Zone as hereinbefore stated. Is this true? Whether it is or not, the relator denies such indebtedness and his case is justiciable and can not be determined by a mere ministerial officer who has undertaken to decide without the intervention of a court or a judge and jury. It seems rather incongruous, to say the least of it, that this auditor should deny his authority and duty to pay the relator his salary and in the next breath assert that he has the authority and the discretion to withhold from the relator \$1,131.76 of his salary for the alleged but denied indebtedness.

It is indisputable that the relator does not owe for house rent or electric lights unless there was some law or some Executive Order in pursuance of an act of Congress which imposed the duty to pay or authorized the collection charges for rent and lights. As a matter of fact there was never any Congressional legislation or any ordinance of the Isthmian Canal Commission, or Executive Order of the President, or any regulation of the Governor of The Panama Canal, providing for the collection of rent or electric light charges for the occupation of government quarters and lighting the same in the Canal Zone until the promulgation of the Executive Order of the President of the United States under date of February 2, 1914. Sec. 17 of this order is as follows:

Where practicable, such bachelor quarters on the Isthmus as may be available from time to time, will be assigned to all employees desiring them. Family quarters when available, will be assigned under such rules as may be prescribed by the governor, and charges will be made for rent, fuel and electric current, at such times and in accordance with such regulations as the President may hereafter establish.

In pursuance of this provision of the Executive Order, the President promulgated on January 15, 1915, another Executive Order in this language:

By virtue of the authority vested in me it is hereby ordered:

1. Pursuant to the provision contained in paragraph 17 of the Executive Order of February 2, 1914, fixing the conditions of employment governing employees of The Panama Canal and the Panama Railroad Company on the Isthmus of Panama, a charge will be made for rent, fuel, and electric current on and after March 1, 1915.

Rent. 2. The rental will be based on a percentage of the value of the quarters occupied, the rate percentum to be the same for all quarters, and the value of the quarters to be appraised by the Governor of The Panama Canal. The amount to be

collected should be sufficient to defray the cost of maintenance of the quarters and grounds, maintenance and renewal of furniture, collection and disposal of garbage, and for bachelor quarters janitor service. No charge will be made for water.

Fuel. 3. Fuel will be sold to employees at cost delivered at quarters.

Electric current. 4. The charge for electric current will be based on the cost of the current delivered to the quarters. When practicable the current used will be measured by meters; otherwise a charge will be made for each lamp or other device installed.

5. Where employees for the good of the service are required to live in certain designated quarters, one-half of the rental will be remitted.

6. When an officer of the Army or Navy is detailed for duty with The Panama Canal and the amount of extra compensation of the position he occupies over and above his official salary as an officer of the Army or Navy is not sufficient to cover his rent, he will not be charged for rent, but will receive no extra compensation.

7. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix and change from time to time if necessary the rates and charges herein outlined subject to the general instructions provided.

8. The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of employees but revocable privileges, which it has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation.

This latter Executive Order became effective March 1, 1915, and was continued in force, and under it rent was charged against employees of The Panama Canal and the Panama Railroad Company for three months thereafter. On May 23, 1915, the President made the following Executive Order, superseding or suspending the operation of the above mentioned order of January 15, 1915:

By virtue of the authority vested in me, it is hereby ordered that the Executive Order of January 13, 1915, relative to charges for rent, fuel and electric current, furnished employees of The Panama Canal and the Panama Railroad Company on the Isthmus of Panama, is modified by suspending from the operation thereof so much as relates to rent, fuel and lights during the period of actual construction of the Panama Canal but not later than June 30, 1916.

It must be observed that during the time for which Judge Jackson is sought to be charged for the rent of the residence and for lighting the same there was no statute or Executive Order authorizing the making such charges and there is no authority for withholding the salary. In other words, prior to March 1, 1915, there was no authority to charge or collect from any one rent for houses or quarters, or for lighting the same, on the Canal Zone. It is manifest that prior to that date it had not been contemplated by Congress, or by the Secretary of War, or by the Canal Zone officials, that rental charges would be made for the occupancy of quarters, and lights, on the Canal Zone. The houses were erected, not for rental purposes, but for the use of the employees of The Panama Canal, The Panama Railroad, and other governmental functionaries who might from time to time, in the discharge of their official duties, be required to reside in the Canal Zone. The purpose

of the United States in acquiring the Canal Zone was to use it as a necessary appurtenance for the construction of the Isthmian Canal—for auxiliary works of Canal construction such as abodes for housing employees, and the like. It will not be insisted that it was the intention of the United States to engage in the real estate business for profit, or that there was any intention on the part of Congress that a rental should be charged against judicial or other officers who were obliged to live in the Canal Zone.

Moreover, the order of March 1, 1915 (above quoted), was the only provision of law for the collection of rents from any one, and that order applied to employees of The Panama Canal and the Panama Railroad and not to the district judge of the Canal Zone. But treating the judge as an employee then we find that for a period of three months less six days, the Executive Order authorizing the collection of rent from employees of The Panama Canal and the Panama Railroad was operative and that it was then suspended as to the persons or class of persons to whom it had been made applicable, namely to the employees of The Panama Canal and the Panama Railroad Company. This Executive Order which authorized the collection of rent from the employees was suspended during the time of the occupancy of the house by Judge Jackson and for which he is charged rent by the respondent. It must, therefore, be held that there was an absence of authority on the part of any one to make such a charge.

It may be well to remember in this connection that no private person could erect a house on the Canal Zone for his individual use. The judge was required by act of Congress to reside in the Canal Zone, and under the circumstances it was not possible for him to do so except by living in one of the houses owned by the Government. That he should occupy such house seemed to have been understood as being in the contemplation of Congress. In the absence of any legislative expression it can not be believed that it was the intention of Congress that the judge, whose office was created by Congress, and who was required to reside in the Canal Zone, should rent quarters from the Government or from any subsidiary governmental agency.

9. But the respondent contends that he has the right to withhold a part of the salary of the judge, fixed and appropriated for by law, because the Adamson Act provides that the judge shall not receive any emoluments except his salary. Pretermittting for the time being the consideration of other phases of the case or questions, let us ascertain the meaning of emoluments. The definition of the term is ascertained from adjudged cases cited in Words and Phrases, vol. 3, p. 2367, where it is said:

Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites.

I think it may be said, therefore, that an emolument is something positively and directly conferred as compensation or gain that the holder of an office receives and not something necessarily, inseparably and incidentally used by him in the discharge of his duty, a duty for which he is paid a fixed salary. Certainly it would not be contended that an employee, for instance, a locomotive engineer, could be charged for the use of the locomotive which was necessary in the performance of work he was hired to do. We must not forget it was the expressed intention to have the judge reside in the Zone, and this intention is just as plain as was the other intention that he should perform judicial work. His physical presence on the Zone was required, and he could not possibly obtain a habitation there except from the Government.

This question here is analogous to the one involved in *McCoy vs. Handlin*, 153 N. W., 361. In that case the contest was over an extra allowance of a specified sum per month to such judges of the Supreme Court as take up their residence at the capital (of South Dakota) to meet the extra expenses thereby caused. The constitutional provisions of the State were that "They—the Supreme Court judges—shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the legislature to increase the salary of the officers named in this article except as hereinafter provided." And, again, that "The judges of the Supreme Court—shall each receive such salary as may be provided by law, consistent with this Constitution, and no such judge shall receive any compensation, perquisite or emolument for or on account of his office in any form whatever, except such salary."

An extra allowance by the legislature of a specified sum per month for such of the judges of the Supreme Court as take up their residence at the capital, to meet the extra expenses thereby caused, was held not to be inhibited by the constitutional provisions quoted. The proceeding there was for mandamus against the auditor for the allowance of a specified sum to such of the judges as had taken up their residence at the capital, etc., and was resisted by the auditor upon the ground that the allowance of such sum per month was in contravention of the State constitution. The decision of the court was against the contention of the auditor. The opinion was well considered, instructive, and is illuminating in the consideration of the instant case. There it was said:

It is clear that the legislature did not intend, in the enactment of such legislation to increase the salaries of the judges, or to grant them any perquisites or emoluments for the discharge of their duties, but only intended to assure them in so far as possible that for the performance of their official duties alone, and not for the performance of such duties and the payment of the expenses incident thereto, they should receive the salaries provided by law for the performance of such duties.

And, again, the Court said:

"These men (the framers of the constitution of South Dakota) must have known that Sec. 1, Art. 2, of the Federal Constitution, declared that the President should receive for his services a compensation 'which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emoluments from the United States or any of them.' These men must have known that the word 'emolument' was, as recognized by every authority, a term broad and comprehensive, one which includes within it 'perquisites,' 'salary,' 'compensation,' 'pay,' 'wages,' and 'fees.' These men must have known that, with the above provisions of the Federal Constitution in force, the Congress of the United States, a body of men which at all times during the history of this Government has had among its members many of the greatest constitutional lawyers of the day, had enacted legislation under which the President, for nearly a century prior to the framing of our Constitution, had been furnished a home, horses, carriages, servants, household equipment, and many other things incidental to and appropriate to his high office. These men must have known that such Federal legislation had never been questioned either as regards its propriety or its constitutionality. These men must have known that in practically every State in the Union (in many of which there were constitutional provisions similar to the one above referred to in the Federal Constitution and to the ones relied upon by defendant in this case) there had been legislative enactments making provisions for the several governors similar to those made by the Federal Congress for the President, as well as innumerable measures appropriating money to be paid other officers to recompense them for expenses incurred in the discharge of their official duties. Is it possible for anyone to presume that these men, with all these facts in mind, intended by the words used in our Constitution, to prohibit allowances for expenses incident to the discharge of public duties? Further light has since been thrown upon the construction given to the provision of the Federal Constitution above referred to by the act of June 23, 1906 (34 Stat. at L. 454, Chap. 2523, Comp. Stat. 1913, sec. 225), which provides: that 'hereafter there may be expended for or on account of the traveling expenses of the President of the United States such sum as Congress may from time to time appropriate, not exceeding \$25,000 per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely.' "

Under appropriations thereafter made by Congress, Presidents Roosevelt and Taft received, and to-day President Wilson is receiving, thousands of dollars each year. So far as we know, it has never been suggested that the money so allowed was an "emolument," and therefore unconstitutional. No one has ever seen fit to accuse those Presidents of being grafters. The judges of the Federal Courts, whose salaries are fixed by a law declaring such salaries shall be the "compensation for their official services," draw from the United States Treasury a sum not exceeding \$10 per day when absent from the places of their residence. Act March 3, 1911, (chap. 231, sec. 259, 36 Stat. at L. 1161, Comp. Stat. 1913, sec. 1236). This allowance is not given as an increase of salary, but to cover the expenses incident to their being away from home in the discharge of their duties.

Paraphrasing, it may be said that the use of the house by Judge Jackson can not be held to be an increase of salary, but was no more than the necessary inseparable incident to his compliance with his

positive duty to reside within the Canal Zone during the term of his office. (Sec. 8, *supra*, Vol. 37, Part 1, U. S. Stat. at L., 62d Cong., p. 565.) The relator was compelled to reside within the Canal Zone, and necessarily could occupy no house except one furnished by the Government. It seems fair to say that if Congress had intended the judge to pay rent for the occupancy of a house in the Canal Zone, when it required him to reside there, it must be presumed that it would have been so stated in the Adamson Act. The lawmakers knew that the United States Government was the owner of all buildings in the Canal Zone, and that the judge required to reside there must occupy one of those buildings. By way of reinforcement of this view it may be said that the members of Congress were familiar with the fact that under the acts or ordinances of the Isthmian Canal Commission the former members of the Canal Zone judiciary had occupied houses free of rent. Act I of the Isthmian Canal Commission of August 16, 1904, in referring to each of the Circuit and Supreme Court judges, provided as follows:

During his term of office he shall be furnished a dwelling house or apartment, or in lieu thereof a sum of money equal to 8 per cent of his annual salary, at the option of the Commission.

The Adamson Act continued in operation all the acts of the Isthmian Canal Commission not repugnant to the provisions of that act itself. This is shown by sec. 2, par. 2, of the act as follows:

That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by the Executive Order are recognized and confirmed to continue in operation until the courts provided for in this act shall be established.

This provision has direct reference to the courts, consequently, when the act required the judge to reside within the Canal Zone his occupancy of a house belonging to the Government or its subsidiary, in the Canal Zone free of rent, when there had never been any stipulation for the payment of rent, can not be considered an emolument. It was no increase of salary. It was no profit. His occupancy of the house as a residence constituted an incident, and perhaps also an inducement, to the discharge of his duty while away from his home in the United States.

In his letter, introduced in evidence in this case, the Attorney General of the United States, Mr. Gregory, when called upon by the Governor of the Panama Canal and the auditor, the respondent here, to pass upon the legality or illegality of withholding from the relator his salary, cited with approval the Benedict case, *supra*, and appropriately said that the question which the auditor, respondent here, has taken upon himself the authority to decide, and to finally decide, "was one

for judicial rather than administrative determination, and that it was a claim that could only be enforced through proceedings in the courts." Mr. Gregory is not the only Attorney General who has passed upon cases involving this question. On June 27, 1893, Mr. Maury gave the opinion, as to the right of the Secretary of the Treasury to withhold from the salary of a Federal judge an amount which had been adjudicated against him in favor of the United States, in a final judgment (Ops. Atty. Gen. 22, 626), as follows:

Sir: It appears by the letter of the First Comptroller of the Treasury of May 28, ultimo., addressed to you, that the United States has recently recovered a judgment in the Supreme Court of the District of Columbia against the Hon. Nathan Goff, as surety on the official bond of James M. Ewing, formerly disbursing clerk of this department, for the sum of \$9,000 with interest and costs, and you have referred the letter to me for an opinion upon the following questions presented therein:

1. Does the act of March 3, 1873 (18 Stat., 481), authorize and require the Secretary of the Treasury to withhold the salary due a public officer who is indebted to the United States?

2. If so, is there any exception in the case of a Federal judge?

As I may not, however, give an opinion on a hypothetical question without exceeding my power as defined by law, I must, in complying with your request, confine myself to the case calling for the action of your department, and shall accordingly proceed to consider whether the act of March 3, 1875, chapter 149 (18 Stat., 481), authorized and requires the Secretary of the Treasury to withhold Judge Goff's salary as a Circuit Judge of the United States for the Fourth Circuit, until the judgment recovered against him as aforesaid shall have been satisfied in that way.

The act of March 3, 1875, is entitled "An act to provide for deducting any debt due the United States from any judgment recovered against the United States by such debtor," and provides as follows:

That when any final judgment recovered against the United States, or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States.

It would be, in my judgment, to abandon the ordinary sense of language and to adopt an unlooked for interpretation to hold that it was in the contemplation of Congress to include, under the expression "claim duly allowed by legal authority," the right of a Federal judge to have his salary paid to him out of money in the Treasury appropriated by law for that purpose.

The allowance of a claim against the United States, involving a discretion which partakes of a judicial character, but it is apparent that there is no room for the exercise, by any "legal authority," of such a discretion with reference to the salary of a judge, which the law requires to be paid, if there is money in the Treasury applicable to it, and failure to pay which is an official delinquency which may be summarily corrected by mandamus.

Without going into the constitutional question and the question of policy suggested in the first comptroller's letter, I content myself with saying that this is not a case where the ordinary sense of the language of the statute should be extended by construction.

In addition, Attorney General Black under date of July 21, 1858, rendered an opinion (Vol. 9, Ops. Atty. Genl., p. 198) an excerpt of which reads as follows:

Though I doubt the power of the Secretary, in the present state of the law to set up a counterclaim of any kind in order to avoid payment of a judgment which Congress has ordered him to pay, yet I do not think there would be impolicy or danger of giving him such power, where the counterclaim is also a judgment, or where it is established by evidence so conclusive that the opposite party is estopped from denying it. In such a case, he would be required to pass on nothing which is open to dispute. His function would be merely ministerial, consisting in nothing but the subtraction of one claim from the other and ascertaining the difference. But here is a claim fiercely contested. It has never been adjudicated in favor of the Government. If it has ever been passed upon by any court, the judgment was against it. There is not a word on record about it. All the evidence concerning it pro and con is in pais. Every fact asserted by one party is not only open to contradiction by the other, but is in fact contradicted, and I have no doubt is most potently believed to be untrue. Not only are all the facts vehemently disputed, but the parties are as wide asunder as the poles on every question of law. It is proposed that this complicated entanglement shall be settled in the chamber of an executive officer, without a trial, without a judge or jury, without examining witnesses, and without hearing counsel.

No such jurisdiction is given to the Secretary of the Treasury by any law, and if the Constitution is not a dead letter Congress can not confer it. The fifth amendment declares that "no person shall be deprived of his life, liberty, or property, without due process of law." This means, and has always been held to mean, that the right of a citizen to his property, as well as his life or liberty, could be taken away only upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the law of the land for the investigation of such subjects. If an executive officer can make an order that the widow and children of Reeside shall be deprived of twenty-four thousand dollars without a trial, then the same officer may, with equal propriety, issue a warrant to hang them, since the Constitution puts life and property on the same footing * * * *

If Congress had power to confer this kind of jurisdiction on the head of the Treasury Department, and would exercise it by passing a law to invest him with all the authority which courts and juries together are clothed with by any defalcation act ever passed, still the Secretary could not set off this claim against that of Mrs. Reeside. Her demand is *res adjudicata*—fixed and settled by a judgment—and the payment of it in full is sanctioned by an Act of Congress. The counterclaim of the Government rests on parol evidence disputed and denied. Now, it is well settled that where one party has a judgment the other can never set off against that judgment a claim not reduced to judgment, however clearly he may be able to prove it. He is always remitted to his action.

For these reasons, and for others which might be adduced, I am perfectly satisfied that the Secretary of the Treasury has no power to stop the payment of the money adjudged to Mrs. Reeside, however well he may be satisfied in his own mind that the counterclaim is well founded. If he is convinced of the indebtedness alleged, he should order a suit to be brought and give the party a fair chance to be heard before the regular tribunals of the country. I am not aware that such power was ever claimed before it was used by the late Secretary in this case; but if it be a practice of the department it ought to be immediately abolished, for it is unjust, unlawful, and unconstitutional.

This language is apposite in the present controversy.

As to the force and legal effect of an official opinion of the Attorney General of the United States when rendered to any executive or administrative officer we can do no better than to refer to the opinion, rendered to the Secretary of the Treasury on date of February 12, 1894, by the Attorney General, Richard Olney (Ops. of Atty. Gen., Vol. XX, 722), as follows:

The act of 1870, section 4, establishing the Department of Justice, provided that written opinions prepared by a subordinate in the department may be approved by the Attorney General, and that "such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney Generals." This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney General shall have some actual and practical force. Congress' intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice. (3 Opin., 97; 6 Opin., 334; 7 Opin., 699, 700; 9 Opin., 35, 37.)

The question now presented is substantially the same as that presented last summer. The duty of this department ended with the rendition of the opinion, and it can not with propriety advise further. (17 opin., 332.)

Mr. Attorney General Gregory was correct in saying that if the authorities in the Canal Zone believe that the relator in the present case owed any amounts of money whatsoever to The Panama Canal it was "a question for judicial rather than administrative determination," and that the claim now urged by the respondent in this case "could only be enforced through proceedings in the courts." That is a sententious and felicitous statement of this case.

Judge Jackson has never had his day in court. He has been deprived of his salary, or the sum of \$1,131.76, without due process of law. It has been withheld from him by the refusal of the auditor in this case to issue his voucher upon which the salary is paid. The indebtedness is denied by Judge Jackson. He denies it upon the grounds that there was no law or regulation under which the indebtedness was or could have been created. He denies that the respondent has authority to withhold any part of his pay in the collection of an alleged but disputed indebtedness. And yet the executive officer has sat as a court and without evidence or hearing, except what he considers a hearing, decided a controversy that he created by his own action. He has passed upon a disputed claim which is a disputed claim merely because he has created the dispute in refusing to make payment where it was his plain duty to make such payment. His conduct, however good his intention may have been, hardly falls short of being shocking to the judicial sense of justice, proper and orderly procedure, in a matter that is

clearly justiciable. Perhaps it is not to be doubted that if, after he had made a careful examination, the Attorney General had found Judge Jackson was indebted, owed the items amounting to the salary which has been withheld by the auditor, that the account would have been settled without court proceedings. Or if not so settled then appropriate court action would have been had for its collection. In any event Judge Jackson was entitled to his day in court. But the auditor here held that having the money for Judge Jackson under his control and subject to his disbursement he had the right to determine the claim against Judge Jackson, one disputed in law and in fact, and now insists that his summary way of determining an issue of law and an issue of fact, and the collection by deduction from the judge's salary of a disputed indebtedness, can not be reviewed or questioned by the court. Notwithstanding that view I think the Attorney General was right in saying that the matter "was one for judicial rather than administrative determination," and whatever demand or offset that the Government may have "could only be enforced through proceedings in the court."

The counsel for the respondent in the oral argument before me insisted that *Gratiot vs. The United States* reported in 14 Peters, 336, authorizes the respondent to retain as an offset the amount claimed by him to be due from Judge Jackson. The following quotation shows the ruling in that case:

There is another instruction asked under this exception, in a complicated form, but which mainly turns upon a consideration whether the Treasury Department had the right to deduct the pay and emoluments of the defendant as a General of the Army, and while he was chief engineer, by setting them off against the balance reported against him, on account of his superintendency of Forts Monroe and Calhoun. In our judgment, the point involves no serious difficulty. The United States possesses the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, or any other account whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, to the extinguishment of the debts due to him.

The opinion in that case does not sustain the contention of the respondent that Treasury officials have the right to make deductions from salaries of other officers whenever, in the opinion of Treasury officials, such officers may be indebted to the United States. An examination of the opinion in that case shows that so such broad principle as that contended for was declared. The facts of that case are essentially different from those in the instant one.

General Gratiot was a disbursing officer of the United States Army, and as such he had drawn large sums of money from the Federal Treasury on warrants signed by himself. He later converted to his own use the sum of \$30,000 from one of the sums which had been drawn

by him for engineering work under construction. In the statement of the Attorney General it was asserted that General Gratiot made no objection to the stopping of his pay. He contended and contended only that the amount of his defalcation should be credited to an account other than that to which the Treasury officials had credited it. He insisted that the \$30,000 embezzled by him should be charged to a particular account that he favored. The court decided in effect that the United States had a right to apply the portion of General Gratiot's salary then due and owing to any of the accounts as it saw fit he had admittedly settled, being a defaulter on all of his accounts.

As has been shown, the amount of the relator's salary had been fixed by law and the money for its payment appropriated, and was by the terms of the law in the possession or under the control of this respondent as disbursing officer, and he as such was under the legal obligation to pay, or, under the regulations and practice, to do his part in the payment of such salary. There was nothing left to be determined by his judgment or according to his discretion. The judge having served as judge, the law itself automatically audited and determined the amount to be paid to him. The case of *McCoy vs. Handlin*, *supra*, is, I think, in point as I have endeavored to show for there it was said:

On the other hand where the amount claimed is fixed by the law, as, for instance, an officer's salary, the auditor is vested with no discretion whatever. If he is satisfied as to the identity of the officer claiming a salary it is his duty to issue his warrant for the amount so fixed. In that case there is nothing to be determined by an action at law, and, if the auditor refused to issue the warrant, mandamus is a proper remedy to compel him to issue the same.

In *Fowler vs. Peirce*, 2 Cal., 165-167, the Court said:

It is true that courts can not compel judicial or other officers vested with legal discretion to act otherwise than in the exercise of that discretion. In the present case, it was the duty of the Comptroller to audit the appellant's account. The nature and amount of the services are ascertained (or not disputed), and the law has fixed a compensation.

The comptroller, who is bound to know the law by which he is required to act, has no discretion in such a case. Nothing remains to be ascertained. He must audit the account according to the law in force; and it will be no sufficient answer to a mistake or refusal on his part, to say he acted according to his discretion. The act of auditing an account, under circumstances like these, becomes merely ministerial and can be enforced by mandamus.

In *State, etc., Collens vs. Jumel, Auditor*, 30 La. Ann., 861-864, the court declared:

When a judge has acquired his office in the mode designated by the Constitution, he has a vested right to its emoluments during the term fixed by the Constitution for its duration.

The legislature can not deprive him of it. He may be impeded in the exercise of his judicial functions. He may be shorn of judicial power and be deprived of the opportunity to discharge the duties imposed upon him by the defense of his office,

but he can not be divested of the office except by one of the modes appointed by the Constitution for that purpose, and he can not be denied his just demand of payment of the salary, which is prohibited from being increased or diminished during his term.

All devices tending to abrasion of the independence of the judiciary, or to subject it to legislative or popular caprice, have been uniformly condemned by the wisest men of our country. Numerous incidents have occurred in the States of attempts of the legislatures to oust judges from their constitutional offices, and deprive them of their salaries, and in no instance has the doctrine announced in the relator's case in the Twenty-sixth Annual found any favor * * *

The independence of the judicial department of the Government is at once the anchor of our stability, the prop of our strength, and the shield of our defense * * * The relator is entitled to his salary for the term of his office, not included in his former suit, and the respondent should have audited his claim therefor to the extent of the appropriations, and drawn the warrants upon the Treasury in accordance therewith.

In the case last above-cited it appears that the auditor did not have the funds sufficient to pay the salary of the judge, but nevertheless, the writ of mandamus issued for such funds as he did have to apply to the payment of the salary of that judge. It apparently had been sought by the Legislature of Louisiana to legislate the relator in that case out of office, and, although the relator, by reason of the act of the legislature, had no judicial function to perform for a considerable period of time, nevertheless, the Supreme Court of Louisiana held that he was entitled to his salary irrespective of the fact that he had not performed the duties of his office, and that mandamus would lie to compel the payment of his salary.

It seems to me that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment, that the officer who controls the funds refuses to pay the salary to the one entitled thereto, mandamus is the proper remedy and the only remedy which the aggrieved party can invoke for the protection and enforcement of his rights.

Counsel for the respondent cited the case of *Butterworth vs. United States*, U. S. 656, 50-69, in support of his contention that mandamus would not lie in the present case. That case not only does not support this contention but it expressly negatives it. There the superior of the Commissioner of Patents, the Secretary of the Interior, had overruled the commissioner, who had already exercised his judgment and discretion in deciding that the relators were entitled to a patent. The Supreme Court of the United States stated that irrespective of the action taken by the superior of the commissioner the writ of mandamus would lie, directing him to issue the patent. The Court said:

Some question is made as to the remedy. We think however, that mandamus will lie and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature and to countersign it, were all that remained and they were all purely

ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have held not to be a valid excuse.

10. It will be noted that the respondent has withheld \$83.33 of Judge Jackson's salary for 5 days' absence from the Canal Zone in excess, as it is alleged, of the 6 weeks' annual vacation allowed under the Adamson Act. It is thus seen the respondent was under the misapprehension that Judge Jackson was to be classed as a day laborer, and that it was his duty as auditor, so he contends, to "dock," to use the respondent's language as a witness on this trial, Judge Jackson's salary on account of alleged absence. Of course any laborer is respected, for labor is honorable, but the judge was not engaged to work by the hour or day. It is sufficient to say that the Act of Congress provided that Judge Jackson should be paid an annual salary of \$6,000 just as United States district judges are paid, and he was given by statute an annual leave of 6 weeks; and that this does not preclude the idea that he could lawfully have a longer leave of absence. Undoubtedly he could have been granted a longer leave, and undoubtedly the judge could not be deprived of the 6 weeks allowed by the statute. If, without authority, Judge Jackson absented himself from the Canal Zone for a period of time not permitted, the remedy for such dereliction was not committed to the judgment or authority of the respondent. For such an excess the judge was amenable to the President, with his power of removal, or to Congress, with its power of impeachment.

The Adamson Act does not provide for vacation for the marshal or the district attorney, and yet they have taken their vacations and the respondent made no deduction from the salary of either on that account. Presumably, he did not make any deduction because they perhaps, took leave or vacation by the consent of some executive functionary. It is rather strange, to say the least of it, that this respondent should now insist he has the right to withhold a part of Judge Jackson's salary for 5 days' absence in view of the fact he was informed that the Attorney General, the head of the Department of Justice advised that the judge's explanation, as to why he had been absent for the brief time mentioned, was entirely satisfactory. And, moreover, it is stranger still that this respondent should withhold the 5 days' pay from the judge in view of the fact that the Comptroller of the Treasury, upon whom the respondent says he relied for direction, never advised him to make any such deduction.

I do not believe that law or propriety justified the respondent in this case to exercise the espionage or petty supervision over the time, services, and whereabouts of the judge as was shown by the testimony on the trial. The testimony in the case warrants the statement that the judge was faithful, efficient, and independent in the discharge of the

duties of his office. And testimony introduced at the trial without objection, showed that Judge Jackson had so properly and fearlessly adjudged in a case before him as to bring forth, from the respondent, a published criticism upon the decision by the judge in that given case. But the judge was independent of him, and if he is to continue to be independent of the respondent, as a judge ought to be, he should not be subservient to the respondent for his salary or compensation.

In deducting \$83.33 from the salary, for the alleged 5 days' absence of the judge, the respondent exceeded his authority.

My conclusion is that the withholding of \$1,131.76 of Judge Jackson's salary was without authority of law; that it is the duty of respondent to issue his warrant or pay voucher for the same; that mandamus is the proper remedy to compel the respondent to perform this ministerial duty; and that, therefore, the peremptory writ of mandamus must be issued as prayed for.

MACFARLANE, *et al.* versus DE ANDRADE.

(District Court, Canal Zone, Balboa Division, July 19, 1916.)

Civil No. 34.

1. APPEAL AND ERROR. WRIT OF ERROR. WHEN SUED OUT.

A writ of error is not "sued out" or "brought" until actually issued, and it must be issued within 6 months after the date of the judgment of the Court from which the writ is prosecuted.

2. APPEAL AND ERROR. WRIT OF ERROR. APPEAL.

In an action at law, the writ of error is the proper process for transferring the case to the appellate court for review. An appeal in such case does not lie.

3. APPEAL AND ERROR. WRIT OF ERROR. WHEN SUED OUT.

Where the bond, assignment of errors, and writ of error were deposited with the clerk within 6 months after the rendition of the judgment but the writ was not signed and more than 6 months had elapsed since the date of the judgment, the writ will be issued in the absence of a holding by the Fifth Circuit Court of Appeals that it may not issue after the expiration of the 6 months period.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorneys for defendant, *Fabrega and Arias*.

JACKSON, District Judge. This case was tried without a jury, and on December 11, 1915, the Court rendered a verdict in favor of the plaintiffs in the sum of \$7,750. Thereafter, on December 14, 1915, motion for new trial was filed, and on January 10, 1916, the motion for new trial was overruled upon the plaintiffs accepting a reduction of the verdict to the sum of \$5,000 with interest and costs, and final judgment therefor was on that date, namely, January 10, 1916, rendered

in favor of the plaintiffs. Thirty days time was given for filing a bill of exceptions, and thereafter a bill of exceptions was filed by the defendant on February 10. Since that time several hearings upon the settlement of the bill of exceptions have been had, and the time for the final settlement thereof has been extended, and yet the bill of exceptions has not been settled and signed by the Court. And on July 11 the plaintiffs' move for execution, predicated upon the fact that 6 months have elapsed since final judgment, and that as yet no writ of error has been "brought" within the meaning of Revised Statutes 1008, Act of 1901.

Considering first the defendant's petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, it must be held upon the authority of the said Circuit Court of Appeals for the Fifth Circuit in the case of the Panama Railroad Company *vs.* Beckford, that appeal will not lie in such case as the present one. The present case is an action at law, tried without a jury, and the Circuit Court of Appeals specifically held in the Beckford case that such action could be reviewed in that court only on a writ of error, and the appeal sued out in that case was accordingly dismissed. Therefore, upon the express authority of the Circuit Court of Appeals of the Fifth Circuit, to which court appeals and writs of error lie from this court, the petition for appeal in this case can not be allowed.

But the defendant also presents a petition for writ of error and an assignment of errors, and asks for an order allowing the assignment of errors. The defendant also presents a stipulation for bond on appeal or writ of error signed by the attorneys for the respective parties and dated the 26th day of May, 1916. This stipulation for bond on the writ of error, together with the petition for the writ of error and the assignment of errors, and the order allowing the writ of error and the writ of error itself, were, according to the statement of counsel for the defendant, lodged with the clerk of the court on said 26th day of May, 1916, but neither the order allowing the writ, nor the writ itself, were signed by the judge, so it can not be said that the same has as yet been "brought" within the meaning of Revised Statutes No. 1008 of the Act of 1901. The Court has no independent recollection of the circumstances attending the presentation of these papers, or why it is that the order allowing the writ of error and the writ of error itself were not signed on said 26th day of May, the day the stipulation for the bond was signed by the respective parties. It may be that counsel for the defendant did all that he considered was incumbent upon him to do, and it may also be that he was not guilty of such laches as would defeat his right to a writ of error if the 6 months time for the bringing thereof were not imperative. But this would seem to be according to the rule

laid down in *Kentucky Coal Co. vs. Howes*, 153 Federal Reporter, p. 163, where the court speaking through Mr. Justice Lurton said:

While a motion for a new trial seasonably filed in an action at law in a circuit court prevents the judgment from becoming final until it is disposed of, time given for the allowance of a bill of exceptions has no such effect and can not enlarge the time within which a writ of error must be brought, which, when the writ is returned to the circuit court of appeals, is limited to six months from the date of the final judgment.

A writ of error is not "brought" within the meaning of Revised Statutes 1008 until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed.

This is the law as established by the Circuit Court of Appeals of the Sixth Circuit, and if this court were favored with a similar ruling by the Circuit Court of Appeals of the Fifth Circuit it would consider it binding to such an extent as to be required to deny the allowance of the writ in the present case. But until there has been an express ruling upon the question involved by the Circuit Court of Appeals of the Fifth Circuit, it is considered best that as a guide to future proceedings this matter should be left to the determination of the Circuit Court of Appeals of the Fifth Circuit for its decision, which will be a guide to us in the future. There is one other circumstance that causes me to allow the writ in this case, and that is that the bond was actually given on May 26. In the case of the *Kentucky Coal Co. vs. Howes*, *supra*, this was not done, and it may be that this failure to give bond had its effect upon the ruling of the court in that particular case. In this case Judge Lurton said as follows:

But it is said that whether plaintiff filed the bond or not it was the duty of the clerk under the order allowing the writ of error, made October 24, 1905, to issue and file the writ before the limit for the bringing of the writ should expire, and that, when the plaintiff has done all that he is required to do he should not be deprived of his remedy by reason of the fault of the clerk in not actually issuing and filing the writ in accordance with the order of the court. For this counsel cite *Insurance Co. vs. Phinney*, where it was held that the failure of a clerk to endorse a writ lodged with him as filed will not defeat the writ; the plaintiff having properly and seasonably sued out and left it with the clerk for filing. The case does not apply to the facts in this case for two reasons; first, the plaintiff did not do all that he was required to do; and second, the clerk did not neglect any duty which the law imposed upon him. The allowance of the writ of error on October 24, 1905, was conditioned upon giving bond. Plainly it was ineffective until the condition was complied with. Nothing appears to show when if ever such a bond was given. The inference from a new allowance upon May 7, 1906, when a writ was filed, is that the allowance of a writ on October 24, 1905, was abandoned and never prosecuted.

The circumstances of the defendant having given a bond in this case on May 26, 1916, within the 6 months limit, and the further circumstance that the case cited established the rule for the Sixth Circuit, and that it may not necessarily be the same for the Fifth, impel me to allow the writ in the present case so that the question may have a conclusive determination in the Circuit Court of Appeals of the Fifth

Circuit. The order allowing the writ, and the writ itself, will, therefore, be signed as of this date, and for the present plaintiffs' motion for execution will be overruled.

[NOTE]. Appeal dismissed on motion by C. C. A. See mandate.

MACFARLANE, *et al.*, versus DE ANDRADE.

(District Court, Canal Zone, Balboa Division, August 2, 1916.)

Civil No. 34.

1. APPEAL AND ERROR. WHEN WRIT OF ERROR SUED OUT.

Statute fixing six months for suing out writ of error is mandatory and jurisdictional.

The writ of error must be issued within such period of time to effect transfer of the case to and confer jurisdiction upon the appellate court. (Citing *Waxahachie vs. Coler*, 92 Fed. 284., 5th C. C. A.)

2. APPEAL AND ERROR. WHEN WRIT SUED OUT. EXECUTION.

When writ of error was sued out after expiration of six months, this court will not issue execution until the appellate court has dismissed the appeal.

3. FORMER OPINION.

Opinion of this court rendered July 9, 1916. 3 C. Z. R., overruled.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorneys for defendant, *Fabrega and Arias*.

JACKSON, District Judge. This case is before the court again upon a motion of plaintiff for execution to be issued against the fund deposited for prosecuting the appeal in the Circuit Court of Appeals of the Fifth Circuit, which motion has been filed subsequent to the signing and allowance by the court of the writ of error herein on July 19, 1916. It was stated in the former opinion herein that, whereas the Circuit Court of Appeals of the Sixth Circuit had held that the six months for suing out a writ of error was mandatory and jurisdictional, and was not extended by time given for settling a bill of exceptions, or by the giving of a bond within said period of 6 months, that the court had not had called to its attention any similar decision by the Circuit Court of Appeals of the Fifth Circuit. Counsel for plaintiff has since called the attention of the court to the case of the City of Waxahachie *vs. Coler*, 92 Federal Reporter, page 284, decided by the Circuit Court of Appeals of the Fifth Circuit, the syllabus of which is as follows:

APPEAL AND ERROR. TIME FOR TAKING. WHEN WRIT OF ERROR IS SUED OUT.

Within the meaning of the provision of the act of March 3, 1891, creating the circuit court of appeals (26 Stat., 826, 829), that no writ of error shall be sued out except within six months after the entry of the order, judgment, or decree sought to be re-

viewed, a writ of error is "sued out" by being obtained and issued, and not by the filing of the petition and bond and obtaining its allowance from the judge of the court rendering the judgment. If the writ is not issued within the six months, the circuit court of appeals is without jurisdiction; and whether the failure to issue it in time is through the negligence of the plaintiff in error or the fault of the clerk appears to be immaterial.

In view of this decision it must be said that the court would not have signed and allowed the writ of error herein if it had been advised of such decision at the time of the signing and allowance of said writ of error, as the decisions of the Circuit Court of Appeals of the Fifth Circuit must be our guide in all matters.

However, the Court having ordered the citation and signed the writ of error it is considered that the matter has now passed beyond the jurisdiction of this court, and that the dismissal of the writ of error is a matter that pertains to the Circuit Court of Appeals of the Fifth Circuit and not to this court, and that to now order execution pending the prosecution of the writ of error, or to now assume to dismiss said writ of error would be tantamount to usurping functions that properly belong to the Circuit Court of Appeals.

The motion for execution herein is therefore denied.

BODDEN *versus* ABRAHMS.

(District Court, Canal Zone, Cristobal Division, August 3, 1916.)

Civil No. 106.

1. PARTNERSHIP. ACTION AGAINST.

An action against A, "doing business under the firm name of 'E. W. Levy & Company' " without allegations in the complaint of the existence of a copartnership, and without prayer against the partnership but with a prayer for relief against the defendant individually, is an action against A alone and not against the partnership. The words "doing business under the firm name of 'E. W. Levy & Company' " following the name of A *held* merely descriptive.

2. PARTNERSHIP. LIABILITY.

Partnership funds can not be subjected to attachment or execution in an action against an individual partner for the payment of the personal debt of the individual partner.

3. PARTNERSHIP. LIABILITY. PARTIES.

The liability of a partnership for a partnership debt is joint and not several, and all partners must be joined in an action thereon to render the partnership liable therefor.

Attorneys for Bodden, Messrs. *Fairman* and *Enderton*.

Attorney for Abrahms, *William C. MacIntyre*.

JACKSON, District Judge. The questions here presented arise primarily upon motion of the plaintiff filed herein May 3, 1916, to

correct the record and to enter judgment herein *nunc pro tunc*. The substance of the motion is to enter judgment herein *nunc pro tunc* in the following language, to wit:

It is therefore ordered and adjudged by the court that the motion of said defendant for a new trial be, and the same hereby is overruled, and that the said plaintiffs, John B. Bodden, recover of the said defendant, Henry G. Abrahms, doing business under the name of E. W. Levy & Co., and the firm of E. W. Levy & Co., the sum of \$1,271 United States currency, together with his costs herein expended to be taxed.

In other words, by expressly adding to the judgment the firm of E. W. Levy & Co., and making that firm a judgment debtor of the plaintiff. Incidentally there arises the question of the right to levy execution upon the sum of \$509 heretofore deposited in court by E. W. Levy & Co., for the payment of one of the notes or due bills referred to in the proceeding, the plaintiff Bodden claiming the right to this fund by virtue of an attachment levied against the same in this proceeding, and one Crosbie likewise claiming the right to levy execution thereon by virtue of a judgment obtained by him in this court against the partnership of E. W. Levy & Co. The principal question to be determined is as stated in the brief of defendant Abrahms as follows:

Is a judgment against Henry G. Abrahms, doing business under the firm name of E. W. Levy & Co., a judgment against E. W. Levy & Co., and as such can it bind the partnership property of E. W. Levy & Co., in which property E. W. Levy has property rights and interests, when E. W. Levy has not been served with process, and is not before the court, and has not had his day in court.

The complaint filed herein September 14, 1915, is entitled, as stated in the caption of this opinion, namely, "John B. Bodden, plaintiff *vs.* Henry G. Abrahms," doing business under the firm name of E. W. Levy & Co., defendant, and this is the only reference made in the complaint to a partnership. It is not stated in the complaint who are the component members of such partnership, or that any such partnership exists as a matter of fact, or where it is doing business, nor was any judgment asked against such partnership, if such there was. On the contrary, it seems to be a proceeding directly against the individual for paragraph two thereof states "that the defendant is a resident of the City of Colon," and the prayer is for a judgment against the defendant without any reference being made to a partnership. As stated, the only reference to a partnership is that in the caption of the suit. If a partnership were attempted to be sued as such, that is, as distinguished from the individual members composing the same, it seems clear that it would be necessary to state in the body of the complaint that the defendant is a partnership composed of certain known individuals and doing business in a certain locality. All of this is lacking in the complaint filed in this case. The defendant Abrahms in his individual

capacity appeared on the 11th day of November, 1915, and filed answer in the nature of a general denial to the complaint. It must be admitted that in the absence of statutory provision a partnership may not sue or be sued in its firm name, and service upon the partnership entity can not be obtained by serving one partner or an authorized agent. The law in this respect seems clear:

The liability of partners upon firm contracts is joint and not joint and several as at common law; and it necessarily follows that all the ostensible members of a partnership must be jointed as defendants in an action brought upon a partnership obligation. Citing 30 Cyc., 565, and cases cited.

Also:

The liability of a firm for its debts is joint and all partners must be joined in an action thereon. 38 Century Digest, Par. 369.

Also:

An action must be brought by one against the members of a partnership in their individual names. In the absence of statutory sanction they can not be sued in the firm name. Citing Abbots Pleading, vol. 1, p. 58, with citations.

Also:

Where not changed by statute the common law doctrine applies to partnerships, and they can neither sue nor be sued in the firm name, and all suits either by a partnership or against them must be in the individual names of all the members of the partnership.

This general rule is stated in many cases, and here follows a number, among them many decisions of the Federal courts.

Also:

The common law does not recognize a partnership as an entity, existing and having rights and liabilities apart from its members. George on Partnership, p. 98.

Therefore, in the first instance, it must be said that as there is no statutory provision in the Canal Zone authorizing a partnership as a partnership entity to sue or be sued, this can not be done if objection is properly made thereto. Of course, the objection in this respect may be waived.

But the question also arises, was the action in effect "attempted to be brought" against the firm of E. W. Levy & Co. so that the objection in this respect might be waived? Of course, if it was not attempted to be so brought no question of waiver could arise. It would seem that the complaint could not be considered as even an attempt to sue the partnership entity because it is well recognized by practically a unanimity of authorities that such words as "executor," or "trustee," or "treasurer," or, as in this case, "doing business under the firm name of E. W. Levy & Co.," are merely descriptive of the person and do not constitute proceeding or judgment when judgment has been rendered against the office but merely against the individual so described; that is, unless the body of the complaint clearly and unmistakably shows that the proceeding was against the person in his official capacity

or against the partnership. It is well known that many individuals carry on business under partnership names when in fact there is no existing partnership; also that many partners continue to use the names of partnerships whose former members have died or gone out of business. This is often done to preserve and enjoy the good will of the partnership. In other words, Smith and Jones may do business under the firm name and style of Brown and Robinson, but the firm of Brown and Robinson would have to be sued as such, naming its component members of Smith and Jones. It could not be sued as in this case merely as a descriptive designation of one member. The distinction is further illustrated in the following case from 27 Nev., 497, as follows:

An action against C & R in business under the firm name of C & R is not an action against the firm but against the individual members thereof.

But an action against the firm of A & B, consisting of & C, is an action against the firm.

As stated above, this action was not brought, nor in the legal acceptance of the term, "attempted to be brought," against the firm of E. W. Levy & Co., and as no answer was filed by Levy & Co., but only by Abrahms in his individual capacity, it can not be held that the objection in this respect was cured. Plaintiff cites cases to the effect that while an action can not be maintained against the partnership in the firm name the objection must be taken at the time, and that a failure to set up the individual names of the parties is merely an irregularity and is cured by the judgment. Also that "a declaration against the partnership in the firm name is good after verdict for plaintiffs where the defendant pleaded the general issue." Also "that a failure to set forth the individual names of a partnership in a suit by one against the partnership is not necessarily fatal." But all these decisions necessarily presuppose an action brought, or attempted to be brought, against the partnership entity as such, and the partnership expressly appearing as such and waiving its rights, or at least not making the necessary objection thereto, or the defendant appearing in an action by the partnership entity and not making the objection at the proper time. Where the partnership entity as such does not clearly appear as the party defendant the answer of the individual could not be held to constitute a substitution of the partnership as the party defendant, and the entry of the appearance of such partnership entity in the proceeding. This would manifestly be unauthorized and illegal.

As further illustrating this proposition as applied to the facts in this case, it will be remembered that the plaintiff in the case sued merely on a verbal contract for goods sold and delivered and for work and labor performed. No reference whatsoever was made in the complaint to notes or drafts given in payment of the goods sold and delivered and work and

labor performed. However, upon cross examination of the plaintiff by the attorney for defendant, Abrahms, it developed that defendant had drawn upon E. W. Levy & Co. of New York in the sum of \$850 in part payment of the account, and that he had given to the plaintiff two due bills in the sum of \$509 each, each dated September 14, 1915, and payable respectively the 7th of October and 14th of November, 1915. In other words, the plaintiff alleged in his complaint that Henry G. Abrahms was indebted to him on a simple contract for goods sold and delivered and work and labor performed, but the defendant attempted to establish the fact that the indebtedness instead of being that of the defendant, Abrahms, was that of the firm of E. W. Levy & Co., and represented by the draft and due bills in question, and for this reason the defendant demurred to the evidence and asked that the jury be instructed to return a verdict for the defendant, which was overruled by the court considering that under all the circumstances of the case the jury should be left to decide the question as to who was the party primarily indebted. The jury accordingly rendered its verdict against Henry G. Abrahms, doing business under the firm name of E. W. Levy & Co., and this was done after the plaintiff had requested leave to expressly add the name of E. W. Levy & Co. as a party defendant, which, coming at the time of the trial, was, of course, denied. The theory upon which the verdict of the jury against Abrahms must be sustained is that he was the party primarily liable, and that for his primary liability he gave to the plaintiff a draft upon E. W. Levy & Co. for \$850 and the two due bills in question of \$509 each. This is manifested by the fact that after the filing of the suit and before the first due bill matured, Levy & Co. deposited in court the full sum of \$509 to meet and take up the same at maturity, and this sum was promptly attached by the plaintiff in the suit herein against Abrahms. The action of Levy & Co. in depositing this sum of \$509, and likewise the subsequent sum of \$509 to meet the due bill maturing November 14, 1915, would seem to have indicated an attempt on their part to promptly meet their obligations whether they were those of one primarily or secondarily liable for the original debt, and that much confusion, trouble and loss to all parties might have been avoided if they had been given time and opportunity so to do. But the plaintiff in his oral testimony in the case stated that he was led to institute the action against Abrahms before the maturity of the due bills given by E. W. Levy & Co. for the reason that the said due bills were not negotiable instruments which he could discount in a bank; that he had been refused accommodation thereon by the banks because they were not negotiable instruments, and that when Abrahms declined to give him proper bankable negotiable instruments of Levy & Co., that he thereupon instituted the proceedings without waiting

for the maturity of the due bills in question. These circumstances would indicate that the plaintiff at all times looked to Abrahms as the party primarily liable, and that his suit was accordingly so instituted, instead of waiting for the maturity of the due bills and suing E. W. Levy & Co. thereon.

Furthermore, it will be remembered that the complaint expressly alleges that the defendant, that is, Abrahms, was the owner of certain property within the Canal Zone, namely 200 head of sea turtles, more or less, and one small vessel called the *Leila*. These turtles and other property belonging to Abrahms were attached, and the plaintiff thereafter moved to dissolve the attachment as against the gasoline launch *Leila* and *Rita*, and other property belonging individually to Abrahms on the ground that if the judgment was, as claimed by the plaintiff, against the partnership of Levy & Co. the individual property of Abrahms could not be sold to satisfy this judgment. This motion was overruled on the theory and with the understanding, at least on the part of the court, that the judgment was against Abrahms and not against the partnership entity; and accordingly after the overruling of the motion for a new trial the marshal sold under execution the gasoline launch for the sum of \$125, a sail boat in the sum of \$26, and one cayuco for the sum of \$1, and also certain other individual property of Abrahms amounting to the sum of \$20, which has been applied to the satisfaction of the judgment and costs. If the verdict of the jury in this case constituted a judgment against the partnership entity of Levy & Co. then clearly the individual property of Abrahms should not have been sold in satisfaction of the judgment. But as stated, the case throughout, according to the complaint, the answer, the testimony adduced at the trial, and all other circumstances, has proceeded as a suit against Abrahms and not against the partnership entity. The matter might have been cured by an adjournment of the case, and leave to file an amended complaint expressly suing the partnership entity, but this was not so done.

Under the circumstances the court finds that John Bodden, the plaintiff, has no judgment and is entitled to no execution against E. W. Levy & Co., and that the fund of \$509 under attachment in the hands of the Marshal is the property of E. W. Levy & Co., and that the same must be released from the attachment of Bodden against Abrahms, and that the said fund is applicable to the satisfaction of the execution now in the hands of the marshal in the suit of Crosbie *vs.* Levy & Co.

It also follows from the foregoing that the motion of the plaintiff filed herein May 3, 1916, to correct the record so as to enter judgment against the firm of E. W. Levy & Co. must be and the same is overruled.

CHISHOLM *versus* PANAMA RAILROAD CO.
GITTENS *versus* PANAMA RAILROAD CO.
SMITH *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division, August 17, 1916.)

Civil Nos. 130, 132, 134, consolidated.

1. COMMON LAW. VESTED INTERESTS.

No vested right or interest is acquired under the common law by one suffering a personal injury as a result of the negligence of another. Congress has the power to declare, modify or repeal the common law.

2. MASTER AND SERVANT. CANAL ZONE EMPLOYERS' LIABILITY ACT. EXCLUSIVE REMEDY.

Subsection 10 of Section 5 of the Panama Canal Act and the Executive Order of March 20, 1914 (E. O. 165), promulgated pursuant thereto provide an exclusive remedy for the recovery of damages for personal injuries sustained as a result of negligency by a person in the employ of The Panama Canal and the Panama Railroad. (Rule in *Greenidge vs. Panama R. R. Co.*, 3 C. Z. Reports, followed.)

3. FEDERAL EMPLOYERS' LIABILITY ACT. CANAL ZONE EMPLOYER'S LIABILITY ACT.

The Canal Zone Employers' Liability Act superseded and repealed the Federal Employer's Liability Act of 1908 as amended in 1910 so far as the Canal Zone is concerned.

Attorneys for Chisholm, *V. G. DeSuze* and *W. H. Carrington*.

Attorneys for Gittens, *W. H. Carrington* and *V. G. DeSuze*.

Attorneys for Smith, *V. G. DeSuze* and *E. A. Reid*.

Attorneys for Panama Railroad Co., *F. Feuille* and *W. F. Van Dame*.

JACKSON, District Judge. These are actions brought to recover damages for personal injuries sustained by employees of the Panama Railroad Company in the discharge of their duties as such by virtue of the provisions of the Federal Employers' Liability Act of 1908, with the amendment thereto of 1910. In each case a demurrer is interposed on behalf of the defendant company as follows:

Now comes the Panama Railroad, the defendant in the above stated case, and, by its attorneys, Frank Feuille and Walter F. Van Dame, demurs to plaintiff's complaint, and for grounds of demurrer says:

That Section 5 (Subsection 10), of the Act of the Congress of the United States, known as the "Panama Canal Act," approved August 24, 1912, provides as follows:

The President shall provide a method for the determination and adjustment of all claims arising out of personal injuries to employees thereafter occurring, while directly engaged in the actual work in connection with the construction, maintenance, operation or sanitation of the Canal, or of the Panama Railroad, or of any auxiliary canals, locks, or other works necessary and convenient for the construction, maintenance, operation or sanitation of the Canal, whether such injuries result in death or not, and prescribing a schedule of compensation therefor, and may revise and modify such method and schedule at any time; and such claims to the extent they shall be allowed

on such adjustment, if allowed at all, shall be paid out of the moneys hereafter appropriated for that purpose, or out of the funds of the Panama Railroad Company, if said company was responsible for said injury, as the case may require.

And in pursuance of said act of Congress, the President of the United States by Executive Order, dated March 20, 1914, effective April 1, 1914, has provided a method for the determination of such compensation and a schedule therefor, and in Section 2 thereof has provided further that such method and schedule shall be the exclusive remedy of the injured employee.

It is further provided in Section 30 of said Executive Order that:

The Governor of The Panama Canal shall make all necessary rules and regulations for the proper, effective, and economical enforcement of this order, and shall decide questions arising under this order, or in regard to the interpretation thereof. His determination of any fact necessary to or underlying any claim hereunder shall be final and conclusive.

And by Section 33 of said Executive Order, it is further provided:

All laws of the Canal Zone inconsistent with any of the provisions of this order are hereby repealed.

And on April 1, 1914, by Circular No. 668, the Governor of The Panama Canal, in compliance with said Executive Order, has provided the necessary rules and regulations for the proper and effective enforcement of said Executive Order, and has provided a method by which an injured employee may present and have determined his claim for injury compensation.

Wherefor, defendant prays that his demurrer may be sustained, and said cause dismissed.

The identical question here presented was passed upon by this court in the case of *Isaac Greenidge vs. The Panama Railroad Co.* in an opinion filed in the Cristobal Division, December 2, 1915, 3 C. Z. Rep., wherein the Court sustained the demurrer of the defendant, and in so doing stated, among other things, as follows:

These laws as promulgated by the President on May 9th, 1904, and as construed and enforced by the courts, were afterwards modified in certain respects by the provisions of the Panama Canal Act, creating a permanent government for the Panama Canal Zone and one of the express provisions of that act was to authorize and require of the President, the promulgation of a method for the determination and adjustment of *all* claims arising out of personal injuries to employees of the Canal or Panama Railroad under certain conditions. In other words, it would seem that Congress intended that there should be substituted for the laws here existing in this respect, what is generally known as a workmen's compensation act, and that the President was empowered and required by act of Congress, to put the provisions of such an Act into effect. This the President did by Executive Order of March 20, 1914, declaring at the time that such method and schedule shall be the exclusive remedy of an injured employee.

In practically all of the States where workmen's compensation laws have been enacted, it has been the purpose of the legislatures to make such laws the sole and exclusive remedy of the workmen on the one hand, and to constitute an absolute obligation as against the employer on the other, thereby abolishing the old remedies at law, together with the old defenses. It is reasonable to suppose that Congress, in legislating as above-stated, for the Canal Zone, had a like purpose in view. Indeed

the wording of the act itself would indicate that the President in the promulgation of his Executive Order, was fully authorized and empowered to declare that it should be the exclusive remedy of the injured employee. As stated by counsel for the defendant, this question must have received the consideration of the President himself and of the Attorney General of the United States.

While the complaint states that the action is brought under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, it must be said that the well-known purpose of this act was to create an absolute liability as against the employers for injuries resulting from the negligence of any of their officers, agents, or employees, and to abolish thereby the old defenses of "fellow-servant", "contributory negligence" and "assumed risks." But there was nothing in this act that could prevent Congress from establishing by further legislation, the mode and manner in which such recovery was to be had, and prescribing the schedule thereof. In other words, taking it out of the hands of the court and putting it in the hands of the Governor as has been done by the Panama Canal Act, and the Executive Order of the President.

It follows that the demurrer to the complaint must be and the same is hereby sustained.

However, the question involved in the Greenidge case has been represented and argued with great zeal and learning, demonstrating a profound research of authorities on behalf of attorneys for the plaintiffs herein, and it is requested that the Court review and reverse its former ruling made in the Greenidge case.

In the first place it must be conceded that neither the common law, giving an employee the right to recover damages on account of personal injuries sustained, nor the provisions of the Federal Employers' Liability Act, ever bestowed such contractual obligations as could not be thereafter repealed, amended or modified. In second, Employers' Liability cases reported in the 223 U. S. Reports, page 50, the court, speaking through Mr. Justice Van Devanter, said:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

Therefore, it must be said that Congress possessed the power, acting directly in the matter, to repeal any preexisting provisions of the common law or the Federal Employers' Liability law relating to the subject, and it likewise had the right to delegate the exercise of this power to the President. And if in so doing it created another remedy, which, in the nature of things, must be exclusive for the enforcement of such rights, such remedy must prevail to the exclusion of all others. In the case of *Loomis vs. The Lehigh Valley R. R. Co.*, 208 New York, page 332, this principle is clearly stated as follows:

When the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right.

The position of counsel for the plaintiffs in this respect, however, is very clearly, forcefully, and succinctly stated in the following language:

We have endeavored in the light of the authorities to state what is the purpose, scope and effect of the Federal Employers' Liability Act on which the plaintiff predicates his right to sue, and we are sanguine that the Court will agree with us that the rights and benefits therein conferred on Federal employees could not be divested except by some affirmative repealing act of Congress, which must be of an equal dignity with the bestowing statute.

And further, in the following language the position of counsel for the plaintiffs is clearly expressed in the following question:

Could the President of the United States by Executive Order repeal National Legislation where Congress did not in specific terms delegate to him that power?

* * * It seems, therefore, that the President acted beyond the powers given him by Congress in declaring his method and schedule the exclusive remedy of the injured party, and this would seem all the more impressive when we consider that the two statutes specifically repealed by the Panama Canal Act covered the same field practically.

But referring to Section 5, Subsection 10, of the Act of Congress known as the Panama Canal Act, we find it is provided that the President *shall* provide a method for the determination and adjustment of *all* claims arising out of personal injuries to employees thereafter occurring while directly engaged in the actual work in connection with the construction, maintenance, operation, or sanitation of the Canal *or* the Panama Railroad. We also find that the President has so provided in his Executive Order of March 20, 1914, and in so doing stated that "all laws of the Canal Zone inconsistent with any of the provisions of this order are hereby repealed." It is clear that the provisions of the Federal Employers' Liability Act are inconsistent with the provisions of the Executive Order of the President establishing a schedule of liability in all cases for it could not have been intended that the injured employee should have two remedies and be entitled to two recoveries on account of the same injury. If the two laws remained in force and effect the employee could recover pursuant to the fixed schedule with or without negligence; and if there were negligence he could thereafter recover under and pursuant to the provisions of the Federal Employers' Liability Act. This was clearly not intended. And although the Federal Employers' Liability Act is in force and effect in all parts of Continental United States, Congress could establish a different law for the Canal Zone and other territorial possessions of the United States. In other words, the Constitutional requirement for uniformity of laws has no application to acts of Congress and executive orders specially designed to meet the particular circumstances and exigencies existing on the Canal Zone.

The question is, therefore, has the Federal Employers' Liability Act been superseded in the Canal Zone "by some affirmative repealing act of Congress which must be of an equal dignity with the existing

statute." Considering that the power was expressly bestowed upon the President by the Panama Canal Act, and that the President acted in pursuance thereof in the promulgation of his Executive Order of March 20, 1914, we think this must be answered in the affirmative. The proposition in this respect has been most clearly and forcibly stated by Judge Henry D. Clayton of the United States District Court of Alabama in discussing the force and effect of Executive Orders of the President putting into effect the provisions of the Panama Canal Act. Judge Clayton states in this respect as follows:

The act (the Panama Canal Act) conferred a very broad power upon the President. It authorized him to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated through a Governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government and protection of the Canal and Canal Zone. *Of course, such Executive Orders as the President promulgated for the purpose of putting said act into effect became a part of the act itself.* Moreover, by its very terms the act did not become operative until the Executive Order put it into effect. *It is plain, therefore, that these Executive Orders are to be interpreted and treated by this court as a part of the Congressional enactment."*

In other words, it is my opinion that the Panama Canal Act, known as the Adamson Act, in many respects merely provided a general outline or plan of government, and did not specifically provide all the details of government but left these to be subsequently provided for by the President in Executive Orders; that it enumerated certain broad, general powers that might be termed "blank powers" which were afterwards to be filled up by Executive Orders of the President of the United States as the varying exigencies and circumstances might here require. Therefore, we are constrained to hold that the regulations of the President in his Executive Order of March 20, 1914, were clearly within the power delegated to him by the Adamson Act, and that the said Executive Order in this respect must be regarded as a part of the act itself, and as possessing equal dignity and force with the original Federal Employers' Liability Act; that the two are inconsistent, and that the provisions of the Executive Order must here prevail to the exclusion of the aforesaid act, as declared by the President.

It follows that the demurrers herein must be and are hereby sustained.

[NOTE]. See *Minnix vs. P. R. R. Co.*, 282 Fed. 47, and *Stroebel vs. P. R. R. Co.*, 282 Fed. 52.

LEBERT, Administratrix, *versus* PACIFIC MAIL STEAMSHIP CO.

(District Court, Canal Zone, Balboa Division, November 1, 1916.)*

Civil No. 128.

1. ADMIRALTY. MARITIME TORT. ELECTION OF REMEDIES.

Daniel Lebert met his death on board defendant's ship from an accident because of defendant's negligence. This suit is in the nature of a common law action

- for damages. Defendant's contention is, that the action is *in rem* on the admiralty side of the court, and that such action is an exclusive remedy, *held*,
1st. That the death of Lebert was the result of a maritime tort and that the plaintiff had the election to sue in admiralty *in rem* or sue for damages in the form of a common law action under the judicial act of 1789 granting to the United States district courts exclusive jurisdiction in admiralty but "saving to suitors in all cases a common law remedy where the common law is competent to give it," and,
2d. That administratrix of the estate of deceased is entitled to maintain the action.

Attorney for plaintiff, *V. E. Bruno*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. The plaintiff as administratrix of Daniel Lebert, deceased, seeks to recover damages in the sum of \$15,000 on account of the death of said decedent in the Canal Zone on June 2, 1916, which death, it is alleged, was caused by negligence and carelessness on the part of the defendant company. The defendant interposes a motion to dismiss for the following reasons:

(1) That under section eight of the Panama Canal Act, jurisdiction in admiralty is conferred upon this court the same as that exercised by the United States District judges and the United States District Courts, and it is further provided by said act that the procedure and practice in such causes shall be the same as that of the courts aforesaid.

(2) That the allegations of the complaint heretofore filed in this cause show clearly that the cause of action attempted to be asserted, if any exists, which the defendant denies, is one exclusively in admiralty, the same being *in rem* against the vessel and not an ordinary civil action against the defendant company above named.

(3) That the admiralty jurisdiction of this court is exclusive and precludes this court from sitting in this cause as other than a court of admiralty.

The defendant in his oral argument and in his brief filed herein cites a number of cases to show conclusively that the admiralty jurisdiction of courts possessing such jurisdiction may be resorted to in cases of this character; that is, that the plaintiff may, if he so elects, proceed *in rem* pursuant to the admiralty jurisdiction conferred upon the Court rather than by way of a common law action, but the question arises, is such admiralty jurisdiction exclusive? Under the Judiciary Act of 1789 defining the jurisdiction of the United States courts in admiralty it would seem not. This act provides that the United States District Courts "shall have exclusive cognizance of all civil cases of admiralty and maritime jurisdiction, including the seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of 10 or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." I find many cases holding that courts at common law have a jurisdiction concur-

rent with the United States District Court over maritime contracts and maritime torts where the suit is brought to obtain a judgment *in personam* against the party. Among those are *The Glide*, 167 U. S., 606; *The Belfast*, 7 Wallace, 624; *Schoonmaker vs. Gilmore*, 102, U. S., 118. In this latter case Mr. Chief Justice Waite says:

The single question in each of these cases is whether the courts of the United States as courts of admiralty have exclusive jurisdiction on suits *in personam* growing out of collisions between vessels while navigating the Ohio River * * * We can not consider it any longer open to argument. The Judiciary Act of 1789, which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea, can not be denied.

In the case of the *American Steamboat Co. vs. Chase*, 16 Wallace, 522, there appears the following:

A steamboat owned by the company ran over a sailboat containing the plaintiff's intestate and killed him. His administrator brought suit against the company in a State court of Rhode Island under an act making common carriers responsible for the deaths occasioned by their negligence, and provided that the damages be recovered in an action on the case. Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common law remedy. The contention was held to be unsound.

From the foregoing it seems apparent that in actions of this character the plaintiff has the right to elect either to proceed in admiralty that is, *in rem*, or at common law; that is, *in personam*. It, therefore, follows that the motion to dismiss for want of jurisdiction must be and is hereby overruled.

DE OBARRIO *versus* DE ARIAS.

(District Court, Canal Zone, Balboa Division, November 1, 1916.)

Civil No. 122.

1. ADVERSE CLAIMANTS. JURISDICTION. JOINT COMMISSION.

Plaintiff and defendant both filed claims before the Joint Commission, constituted under the treaty between the United States and the Republic of Panama, for the value of the property in controversy. The Joint Commission suspended action on the claims until there was a judicial determination as to who owned the property. This suit to determine adverse claimants to the property was then brought, and it is *held* that the court had jurisdiction to determine such adverse claimants under the facts in this case even though the land had been expropriated by the United States.

Attorneys for plaintiff, *Fabrega and Arias*.

Attorney for defendant, *Oscar Teran*.

JACKSON, District Judge. In the petition filed herein the plaintiffs pray judgment "that defendant be required to set forth the nature of

her claim, and that all adverse claims of the defendant be determined by decree of this court, and that by said decree it be declared and adjudged that plaintiffs are the owners of said premises and entitled to the possession thereof, and that defendant has no estate nor interest whatever in or to said land and premises, and that defendant be forever debarred from asserting any claim whatever in and to said land and premises adverse to plaintiffs, and for such other and further relief as to equity shall seem meet and proper."

To this petition the defendant by her counsel interposes a demurrer for the reason that it appears upon the face of the complaint that this is a suit in ejectment for the recovery of land, otherwise known as a suit in revindication; that the land sought to be recovered is situated in the Canal Zone, and that it is the subject of a claim before the Joint Commission, and that under the Executive Order of the President of the United States, dated December 5, 1912, all land and land under water within the Canal Zone has been declared necessary for Canal purposes, and has been expropriated by the Government of the United States, and that this particular tract of land described in the complaint has been taken by the officials of the Government of the United States and is no longer the subject of private ownership; that a Joint Commission has been created and vested with special jurisdiction over claims dealing with the value of all land thus expropriated by the Government of the United States, and that a claim relating to the particular tract of land described in the complaint is now pending before the said Joint Commission.

It is undoubtedly true that, according to the ruling of the Joint Commission, the title to this and all other property in the Canal Zone has passed to the Government of the United States, leaving to the parties only a claim for the value thereof before the Joint Commission. But it is nevertheless true that the Joint Commission has not as yet passed upon the claim for the property here in litigation and has declined so to do for the reason that the parties, plaintiffs and defendant, herein are adverse claimants, and the decision of the Joint Commission is awaiting the decision of the court as to who is or was the lawful owner of the land in question.

The Joint Commission has promulgated the following rule of procedure for claims in dispute:

I. The claimant having first filed his claim before the Commission, or whose claim has the lowest number on the list of claims, will be considered as the true owner of the claim, unless an adverse claimant should prove that he has a legitimate claim over all or a part of the property expropriated for the uses of the Canal, in accordance with the provisions of the treaty of November 18, 1903.

II. All persons filing a claim in conflict with rights urged by preceding claimants must present proof within a period, to be fixed in each case by the Commission, for the purpose of establishing that the said rights in dispute have been submitted to the

decision of a competent tribunal of the Canal Zone, or that they are in course of settlement by means of arbitration, or by direct amicable agreement.

Under these circumstances it seems clear that the rights of the parties hereto as adverse claimants could not be worked out before the Joint Commission, but that it is necessary that they should be worked out through proper proceedings in this court.

The petition does not constitute a suit in ejectment for the recovery of land, but rather one for the determination of the rights of the parties in and to such equitable interests to the property as they may have. Being so considered the demurrer must be and is hereby overruled.

DE SUZE *versus* ARCIA.

(District Court, Canal Zone, Cristobal Division, November 6, 1916.)

Civil No. 138.

1. ATTORNEY AND CLIENT. PRIVILEGED COMMUNICATIONS.

An attorney should be excused from testifying in an action to facts communicated to him by his client which are material to the determination of an action, on the ground that such communications are privileged.

Attorney for plaintiff, *E. A. Read*.

Attorney for defendant, *William C. MacIntyre*.

JACKSON, District Judge. The defendant prays for a new trial herein for the following reasons:

1. Because the judgment is contrary to law.

2. Because the Court erred as a matter of law in excusing the witness Carrington from testifying, as to facts material to plaintiff's case, when the answers to the questions propounded to said witness did not involve the disclosure of any facts of a confidential nature.

3. Because the above-named defendant did not testify that the witness Carrington was ever his attorney.

The sole ground relied upon in the oral argument was that the Court acceded to the request of attorney W. H. Carrington that he be not required to testify in the case. The request of attorney Carrington was based upon two grounds; first, that of professional privilege, and, second, that of a confidential relation existing between attorney and client, which is always a bar to testimony by an attorney against an existing or a former client. The attorney for the defendant Arcia joined in the request and objected to testimony on behalf of attorney Carrington.

The circumstances of the case were such that whereas Mr. Carrington was nominally counsel for Eusebio Morales and Ricardo Arias, never-

theless the relations existing between all the parties to the suit on the one side and the Panama Railroad on the other were such that in substance and effect such confidential relation existed between the parties and their attorneys, as in my opinion to bring them within the spirit of the law that prohibits an attorney from testifying to anything that came to him from his client during the professional relationship. A study of the original case, out of which this present suit arose, convinces me that for Mr. Carrington to have been compelled to testify against the objection of Governor Arcia would, in effect, have been a disclosure of matters that came to him as a result of that close confidential relation which exists between attorney and client, and which it is the policy of the law to protect.

For the reasons stated it follows that the motion for a new trial must be and is hereby overruled.

FROST *versus* STAR & HERALD COMPANY.

(District Court, Canal Zone, Balboa Division, January 2, 1917.)

Civil No. 194.

COURTS. JURISDICTION. SERVICE OF SUMMONS ON FOREIGN CORPORATION.

Action for libel against a foreign corporation publishing a paper in the Republic of Panama. Summons was served on Duque, a director of the corporation while present at Ancon, Canal Zone, in attendance on the District Court as a witness and attorney in fact for a litigant therein. Motion made on special appearance to quash service of summons. *Held*,

1. That said Duque, a nonresident of the Canal Zone, was exempt from service of summons while attending court in the Canal Zone as a witness and attorney in fact for a litigant therein.
2. That service of summons on a foreign corporation, under section 411 of the Code of Civil Procedure, can only be made upon a managing or business agent, cashier, or secretary thereof, or on an agent authorized to accept service of summons.
3. That the court has no jurisdiction in this case, distinguishing the case of *Corrigan vs. J. Budd Smith*, 3 C. Z. Reports.

Attorney for plaintiff, *E. M. Robinson*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. This is an action for libel wherein the plaintiff, J. R. Frost, seeks to recover from the defendant, the Star & Herald Company, damages in the sum of \$25,000 on account of an alleged false, malicious, and defamatory publication appearing in the daily paper of said defendant company on October 17, 1917. Personal

service was obtained herein on one Thomas Gabriel Duque on the 16th of November, 1917. The return of the marshal states that he served "the within-named the Star & Herald Company at the Ancon Court House, Ancon, C. Z., by delivering a true copy to T. Gabriel Duque, director of the Star & Herald Co." The defendant company moves to quash the summons issued in this cause and to set aside the service thereof for the reasons; first, that when the said Thomas Gabriel Duque was served with the complaint and summons in said cause he was in attendance at the District Court in Ancon at a certain trial or proceeding for the establishment of certain claims against the estate of Teresa Valdez de Ayala, deceased, which said matter had been specially set for hearing by the court on the morning of the said 16th day of November, 1917. That he appeared as attorney in fact under a power of attorney from his father, J. Gabriel Duque, for the purpose of testifying, if necessary, to the correctness of the claim of his said father, J. Gabriel Duque, against the estate of Teresa Valdez de Ayala, deceased. And, second, because the said Star & Herald Company is a foreign corporation doing business in the Republic of Panama, and having no managing or business agent, cashier, or secretary within the Canal Zone, or any agent authorized by the said corporation to accept service for it, and that the said Thomas Gabriel Duque was not on the 16th day of November, 1917, authorized by the defendant company to act as its agent for the purpose of accepting service or process in the Canal Zone. The ground for the motion to quash the service is supported by the affidavits of Thomas Gabriel Duque and Samuel Lewis, filed herein, from which it would appear that he was, in fact, in attendance at the court for the purposes aforesaid, and also that, while he is a director of the defendant company, he is not the managing or business agent, cashier, or secretary thereof, or authorized to accept service for it.

Taking up first the second ground for quashing the service of summons, the Code of Civil Procedure of the Canal Zone provides two methods for obtaining service against foreign corporations. The first, pursuant to Section 411, is by direct or personal service as follows:

If the suit is against a foreign corporation or a nonresident joint stock company, or association doing business in and having a managing or business agent, cashier, or secretary within the Canal Zone, to such agent, cashier, or secretary; or to any agent authorized by the corporation, joint stock company, or association to accept service for it or them.

The second method is by publication as provided for in Section 413 and which provides that where the defendant "is a foreign corporation, having no managing or business agent, cashier, or secretary, within the Zone, and the fact appears by affidavit to the satisfaction of the judge of the court where the action is pending * * * such

judge may make an order that the service may be made by publication of the order which shall fix the date on which the defendant is required to appear."

To obtain service by publication, pursuant to said Section 413, it is necessary that an attachment should be had against the properties of the defendant company within the Canal Zone, but the plaintiff has proceeded pursuant to Section 411 to obtain direct personal service, and it appearing that the defendant is a foreign corporation it is evident that such service must be upon the managing or business agent, cashier, or secretary, who has an office or conducts business as such for and on behalf of the company within the Canal Zone; or that the company must be engaged in business in the Canal Zone and have designated or authorized some agent to accept service for it. The mere fact that a foreign corporation may generally sell its products, which in this case is the daily paper of defendant, in the Canal Zone clearly does not justify a personal service against one of its directors who is not either a managing or business agent, cashier, or secretary, within the Canal Zone, and who has never been authorized by the corporation to accept service for it. Such service clearly does not meet the requirements of the statute, and, as the facts in this respect are established by the affidavits of Messrs. Thomas Gabriel Duque and Samuel Lewis, it follows that the motion to quash the service of the summons must be granted for this purpose if for no other.

But considering briefly the second ground of defendant's motion, it must be stated that the questions here presented are very different from those presented in the case of *Corrigan vs. J. Budd Smith*. In the opinion filed herein in the case of *J. Budd Smith* this court recognized the principle of law that attendance at court as a litigant or witness in a pending case constituted a privilege against being served with summons in another proceeding. This principle seems to be well recognized in the case of *Matthews vs. Tufts*, 87 New York, 568. It was held as follows:

A defendant present for the purpose of attending a meeting of creditors of a bankrupt solely as a creditor and witness to prove his debt or claim against the estate, to participate in the choice of an assignee and for no other purpose, served with process 15 minutes after the adjournment of the meeting was held privileged.

In the case of *Cooper vs. Wyman*, 24 L. R. A., p. 278, it was held that a nonresident who comes into the State for the sole purpose of attending a litigation, either as suitor or a witness, is exempt from service of civil process during his coming, his stay, and a reasonable time for his return. And exactly the same principle as contended for by the defendant herein was held in the case of *Golden vs. The Morning News Co. of New Haven*, decided by Judge Lacombe of New York and reported in 42 Federal Reporter 112. This court now recognizes

and did recognize that principle as a correct and salutary proposition of law in the case of J. Budd Smith, but it was held in the Smith case that the facts of attendance at court by defendant as a witness or suitor in a pending case were not sufficiently established by the affidavits filed therein. Further, this court decided that by appearing generally on the 18th day of April, and by filing a motion to dissolve the restraining order, and also by filing a motion to strike the motion of the receiver appointed by the court of Panama, wherein the latter asked leave to intervene, the defendant, J. Budd Smith, had voluntarily entered his appearance in that case and had waived a privilege of which he might otherwise have taken advantage. This question the Court considered as definitely settled by the decision of the United States Circuit Court of Appeals of the Fifth Circuit at New Orleans in the case of *Edgell et al vs. Felder*, 84 Fed. Reporter, p. 69. The defendant, J. Budd Smith, did not move to set aside the service until after he had entered his appearance voluntarily and submitted himself to the jurisdiction of the court, by filing a motion to dissolve the restraining order.

Therefore, for the first as well as for the second ground alleged for quashing the service of the summons, the Court is of the opinion that the said motion should be granted and it is so ordered.

LEBERT, Administratrix, *versus* PACIFIC MAIL STEAMSHIP CO.

(District Court, Canal Zone, Balboa Division, January 19, 1917.)

Civil No. 128.

1. COURTS. JURISDICTION. ACTION FOR WRONGFUL DEATH. SURVIVAL OF ACTION.

An action for wrongful death did not survive at common law. There is no statute in the Canal Zone providing for survival of such action except Employers' Liability laws, citing Art. 2341, Civil Code, and Code of Civil Procedure, sections 42 and 146. All decisions of Canal Zone courts holding to the contrary expressly overruled. (See *Rock vs. P. R. R. Co.*, 266 U. S., 209.)

Attorney for plaintiff, *V. E. Bruno*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. The plaintiff as administratrix of the estate of Daniel Lebert, deceased, seeks to recover damages herein in the sum of \$15,000 by reason of the alleged wrongful death of the said Daniel Lebert on June 2, 1916. The complaint alleges that while said deceased was employed by the defendant company in and about its said steamship *San Jose*, he met his death on the day aforesaid by reason of the carelessness and gross negligence on the part of the defend-

ant company in allowing to remain open a certain hatch on the second or freight deck of said defendant's steamship in which the deceased fell while in the performance of the duties assigned to him and without any negligence on his part. The action is instituted by the administratrix as such, and, although the complaint in paragraph 7 thereof states that the deceased left surviving him a widow and two children of tender years, it does not allege that said action is brought solely for the benefit of said widow and children, nor is there set forth the statute upon which the complaint relies in support of the action.

The defendant interposes a plea to the jurisdiction "for the reason that there is no provision under the laws of the Canal Zone for the survival of an action for damages wherein death is caused to the alleged injured party through negligence, and for the further reason that under the laws of the Canal Zone and of the Republic of Colombia an administratrix or an administrator is not authorized to institute an action for damages resulting in the death of the deceased. The question here raised by the defendant has heretofore, indirectly at least, been decided contrary to the contention of the defendant by the former Circuit and Supreme Courts of the Canal Zone. In the case of *Thull vs. the Panama Railroad Co.* the administrator sought to recover damages against the Panama Railroad Co. on account of the wrongful death of the deceased who was at the time an employee of the Isthmian Canal Commission, and who was operating a train over the tracks of the Railroad Company. It seemed to have been assumed for the purposes of that case that an action for wrongful death survived. At least the contrary was not raised or presented either to the Circuit or the Supreme Courts, but the recovery was denied for the reasons stated that "the lessor is not liable to the servant of the lessee for injuries received in the line of service required of him in operating a railroad." *Thull* did not invoke the benefit of the Federal Employers' Liability Act, but the action was predicated upon the theory that a right of action for wrongful death survived independently of said Federal Employers' Liability Act. The case, however, was decided upon the question of the liability of the lessor for injuries resulting to a servant of the lessee.

Thereafter, this court acting upon the authority of the case of *Thull vs. the Panama Railroad Co.* has held in this and other cases that an action for death survived in the Canal Zone, but the question is again presented and has been argued with a citation of many new and interesting authorities, which were not heretofore brought to the attention of the Court. It must be conceded that such actions as the present have their origin in the express provisions of some statutory law.

In the case of *Reese vs. Shay*, 2 C. Z. Rep., p. 72, it was held that an action for slander can be maintained in the Canal Zone by reason of the express provisions of the Code of Civil Procedure, chapter 3, section

42, which provides that "an action for injury to the person; action for libel or slander; for assault, battery, malicious prosecution or false imprisonment, or for injuries resulting therefrom, shall be barred if not prosecuted within one year." And so acting under the express provisions of this statute it was held in the case of *Denst vs. Gramlich*, 2 C. Z. Rep., p. 223, that an action of libel would likewise lie in the Canal Zone. It is clear that at common law an action for death did not survive. This principle was stated in *Baker vs. Bolton A. Campbell*, 943, decided by Lord Ellenborough as follows:

At common law the right of action for an injury to the person abates upon the death of the party injured, the case falling within the familiar rule *actio personales moritur cum personas*. Hence, where the death results, whether instantaneously or not from such injuries no action can be maintained by the personal representative of the party injured to recover damages suffered by the decedent.

This rule has ever since been recognized in all States of the Union. For instance, in *Kramer vs. Railway Co.*, 25 Cal., 434, the Court, speaking through Sanderson, Chief Justice, said:

That a civil action for the death of a person *per se* can not be maintained by any one at common law is too well settled to admit of discussion at the present time. The rule is so well and firmly established that an investigation of its reason and philosophy would be idle and useless. A citation of a few authorities is deemed sufficient.

An action for the death of a person can still be maintained in this State by virtue of the provisions of the act entitled "An act to require compensation for causing death by wrongful act, neglect, and default" passed April 26, 1862.

The question therefore arises whether there exists in the Canal Zone, or in the laws of Colombia applicable to the Canal Zone, any express statutory provision granting the right to maintain a civil action for wrongful death. The Code of Civil Procedure of the Canal Zone fails to recognize such right. Section 146 of the code, *supra*, provides:

If a person entitled to bring an action, die before the expiration of the term limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death.

This is the only section of the Civil Code that approximates the question at issue, and this clearly contemplates a cause of action that survives, and, as before stated at common law, an action for wrongful death did not survive but died with the party sustaining the injury.

The only statute in force in the Canal Zone upon which plaintiff in this case could possibly predicate a right of recovery is contained in Art. 2341 of the Civil Code which reads as follows:

He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed.

But it will be noted that this statute does not expressly confer an action for wrongful death, nor does it specify the party who would be

authorized to sue and recover therefor. In England and in all the States of the Union all statutes authorizing a recovery in such actions expressly provide the persons for whose benefit such actions may be instituted. It is customary to provide that the action may be maintained for the benefit of the surviving widow or children or husband or father, or brothers or sisters. In some States the administrator is allowed to sue as such for and on behalf of the general estate, while in others it is specifically limited to certain designated heirs. It may be said that it is necessary that there should be such a specific designation of beneficiaries for otherwise an action for the wrongful death might be brought by any one even by a friend or an acquaintance of the deceased by proving that he or she had cherished feelings of friendship or affection for the deceased, and that they had in some way been financially damaged by his death.

The authorities which I have recently examined show conclusively that the right of action is not only strictly one of statutory origin but that it must be strictly limited to the beneficiaries named in the statute, and that no right of action can be maintained except by those expressly and specifically named. From this it would seem to follow conclusively that where there is no such statute there is no such right of action.

In 1825 there was in force and effect in the State of Louisiana an act which provided:

Every act whatever of man which causes damages to another obliges him by whose fault it happened to repair it.

And in *Hubgh vs. New Orleans, &c., Railroad Co.*, 6 Louisiana Ann., 498, decided in 1851, it was held that this article did not give to any surviving relative a cause of action for damages for personal injuries resulting in death. It was there observed that an action for damages for the killing of a human being did not exist in common law nor in the Roman or Spanish laws, in which the provisions of the article of the code were found.

In the case of *Jos. Flash vs. The Louisiana Western R. R. Co.*, decided by the Supreme Court of Louisiana on April 12, 1915, and reported in *Lawyers' Reports Annotated*, it was held "the right of action for damages for the death of a human being is in derogation of common right, and can not be extended by implication to other surviving relations than those to whom it is granted expressly by statute."

2. Although Act No. 120 of 1908, amending Art. 2315 of the Civil Code so as to provide that a right of action for damages shall survive in favor of the surviving children or widow, father or mother, brothers or sisters, in case of the death of the injured person, concludes with this declaration: "The survivors above-mentioned may also recover the damages sustained by them by the death of the parent or children, or husband or wife, or brothers or sisters as the case may be, the hus-

band has no right of action for damages for the death of his wife because he is not one of the survivors above-mentioned." On page 117 of this case the court speaking through Mr. Justice O'Neill said:

This court has never extended by implication the right of action conferred by statute upon the survivors named either for the damages sustained by the deceased person, or for the grief or loss suffered by the survivors.

For example, it has been held that the designation of the survivors as minor children in Act 71 of 1884 should be construed strictly, and does not include grandchildren notwithstanding the last article of our Civil Code provides that the term "children" wherever used therein means "grandchildren, great grandchildren, and all other legitimate direct descendants." * * *

In *Lynch vs. Knoop*, 118 La., 611, it was held that the term "surviving mother" in the statute of 1884, meant only the mother of a legitimate child and not the mother of an illegitimate child * * *

And in *Vaughn vs. Lumber Co.*, 119 La. 61, it was held that the term "widow" in Act 71 of 1884, meant the surviving lawful wife, and did not include the putative wife, even though she married in good faith and in ignorance of the fact that the other party to the ceremony was already married to another woman.

Those Louisiana cases show with what strictness statutes granting a right of action for compensation for death by wrongful act are construed, and, as frequently stated, the decisions of this court should be guided by and should approximate as nearly as possible to the decisions of the Louisiana courts because of the fact that here and in Louisiana the Civil Code prevails.

In the case of *Deham vs. the Mexican Nat. Railroad Co.*, decided by the Court of Civil Appeals of Texas, April 6, 1893, reported in *South Western Reporter*, Vol. 22, it was decided that "since the laws of Mexico did not give a right of action for death caused by wrongful act to another no action can be maintained in Texas for the negligence of a railroad within that country which resulted in the death of one of its employees, though the death occurred within this State." It would seem that in this case the Court of Appeals of Texas denied the right to recover although the death occurred in Texas, and also there was in existence in the Republic of Mexico, where the injury which caused the death occurred, a law substantially similar to that which is relied upon by the plaintiff in the present case. And the same view appears to have been taken by the Common Pleas Court of New York City and County in the case of *Geoghegan vs. the Atlas Steamship Co.*, decided April 3, 1893, which was an action brought in New York for the wrongful death of a party occurring in the waters of the Republic of Colombia, and the New York courts denied the right to maintain such action for the wrongful death occurring as it did in the jurisdiction of Colombia where there was in existence precisely the same

statute which is relied upon by the plaintiff in this case, as the real basis for recovery herein. It was considered by Judge Pryor in deciding this case that there was an absence of any statute affording such a right of action, and, as stated, the statute of Colombia was in all respects similar to the statute relied upon herein.

It may be added that this seems to be the view not only of courts but of learned law writers upon the subject. In an article written by Judge Harrington Putnam of the Appellate Division of the Supreme Court of New York, published in Case and Comment of July, 1915, there appears the following:

More difficult and unsatisfactory problems must arise when our commerce is extended through the Panama Canal and reaches toward South America. Extensive passenger traffic already converges at the Canal Zone.

And then, referring to the Colombian case above-cited and one other the writer states:

Both those injured sufferers presumably sought to find their remedy in a local statute and discovered nothing applicable * * * Hence, it would seem certain that a vessel from Mexico or one from the United States of Colombia can not now be subject to any such liability in our Federal courts where a fatality occurs on the high seas, or probably within the waters of the Canal Zone. Although the system of compensation to workmen in the Zone by Executive Order recognized a liability for an employee's death, that *does not apply to a person not in the Government employ.*

Louisiana in 1884 passed a death statute that gave a recovery to survivors. But their courts administering the civil law declare this act created a remedy before unknown.

The author then cites the case of the *Van Amburg vs. Vicksburg &c. R. R. Co.*, 37 La. Ann., 650, as follows:

Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man can not be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the single spectacle has been witnessed of courts sanctioning damages for short-lived pains, and refusing them for a long-life sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary stays of life. Legislation has at last come to the relief of future sufferers. The Act of 1884 applies the remedy that the public conscience has long demanded, but it has missed application to this case only by a few days.

And concludes with the following significant and well-considered statement:

As Louisiana is under the French civil law, this admission that their system had given no remedy for loss of life suggests a like condition in the South American states under the Spanish civil law. Certainly an action for death caused by their vessels, in our Federal courts, would be a futile and lame pursuit, judging by the two cases as to Colombia.

It follows from the foregoing that, notwithstanding the view heretofore entertained by the Circuit and the Supreme Courts of the Canal Zone and heretofore followed in this case, there is no statute conferring

a right of action for death by wrongful act in force and effect in the Canal Zone. The well-considered cases and authorities hereinbefore referred to and which have but recently been brought to my attention, seem to clearly demonstrate this fact, and, as it is the duty of courts to declare and enforce the law when properly brought to its attention irrespective of any contrary ruling that may have theretofore been made, it follows that the plea to the jurisdiction herein must be and the same is hereby sustained.

ARIAS F., JR., *versus* RODRIGUEZ & URIBE (Copartners).

(District Court, Canal Zone, Balboa Division, February 3, 1917.)

Civil No. 127.

1. CONTRACTS.

Where A sold cement to R and U, reserving title to sacks containing such cement, and where price paid for cement was less than the price of cement with sacks included, and where the books of R and U show that sacks were not included in purchase, *held* that A could recover value of sacks from R and U who failed to return sacks to A.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorney for defendants, *V.E. Bruno*.

JACKSON, District Judge. The original action herein was one in replevin, seeking to recover the possession of 7,515 empty cement bags of the value of \$638.77, together with damages in the sum of \$250 for their taking and detention. The plaintiff alleged that he was and still is the owner of said 7,515 empty cement bags; that on the 5th of April, 1916, he acquired the ownership thereof by purchase from the Supply Department of The Panama Canal, together with the cement therein, with the understanding by and between the plaintiff and the officials of The Panama Canal that upon the return of said empty bags The Panama Canal would refund to him the sum of \$638.77, United States currency, the value of the bags aforesaid. That thereafter the plaintiff sold to the American Trade Developing Company the cement in said bags as aforesaid, from which company the plaintiff, acting as the representative of the Bank of the Canal Zone and the Continental Banking & Trust Company, and A. Sandi, financiers, who financed the work on the fill near the American wharf in Panama, purchased the said cement agreeing to return the said bags to the said American Trade Developing Company. It is the plaintiff's contention that the bags were all to be returned by the said American Trade Developing Company to the general storekeeper of The Panama Canal, which official was to give to plaintiff the proper credit there-

for; that he, plaintiff, acquired from the said company the cement contained in said bags but not the bags themselves, and that he has been unable to return the same to the said American Trade Developing Company because the defendants had wrongfully appropriated the said bags to their own use and refused to deliver them to plaintiff, but, on the contrary, had delivered them to the general storekeeper of the Supply Department of The Panama Canal, seeking to recover for themselves, and to convert and appropriate to their own use, the said sum of \$638.77, the defendants well knowing at the time of the delivery of said empty cement bags that the plaintiff was and now is the sole and exclusive owner thereof.

An amended complaint was subsequently filed on September 14, 1916, wherein it was stated that the empty cement bags mentioned in the original complaint had by The Panama Canal been shipped to the United States, and that they were no longer subject to the jurisdiction of the court, and not subject to levy and seizure under the writ of replevin theretofore issued, but that the auditor of The Panama Canal had filed an affidavit stating that such official holds the sum of \$638.77, United States currency, the value of said cement bags returned to The Panama Canal, which said amount the said auditor is willing to pay on behalf of The Panama Canal to the party or parties who may, by final order of the court, be adjudged as entitled thereto. The affidavit of the auditor, filed herein on the 12th day of December, 1916, has been considered as having the force and effect of an interpleader on his behalf by virtue of which he places subject to the jurisdiction of the Court the sum in question for the benefit of such person or persons as may be declared lawfully entitled thereto. The affidavit of the auditor states, among other things, "that on or about the 5th day of April, 1916, The Panama Canal sold to Ramon Arias F., Jr., of the City of Panama, Republic of Panama, plaintiff in the above-entitled case, 4,000 bags (double) cement, among other things, with the understanding that the 8,000 empty bags containing such cement would be paid for upon their delivery to The Panama Canal at the rate of .085c per bag."

The defendants' answer constitutes substantially a general denial to all of the material allegations of the original complaint. And it is contended that the defendants, Rodriquez & Uribe, were the lawful owners of the bags in question, and that having returned the same to the general storekeeper of The Panama Canal they and not the plaintiff are entitled to the sum in the hands of the said auditor, namely \$638.77. In support of their contention the defendant's claim that they purchased the bags of cement in question directly from the American Trade Developing Company, paying therefor on April 7, 1916, the sum of \$3,750, as evidenced by their check of that date drawn upon the Continental Banking & Trust Co. for the sum in question payable

to the order of the said American Trade & Developing Co. and duly signed "Rodriguez & Uribe." Said check, in English, reads as follows

No. 118

Panama, R. P., April 7, 1916.

CONTINENTAL BANKING & TRUST COMPANY Pay to the order of American Trade Developing Co. \$3,750, three thousand seven hundred and fifty U. S. currency dollars.

Rodriguez & Uribe.

Act No. 34

Voucher No. 63

PAID Apr. 11, 1916

[Stamp]

Continental Banking & Trust Co.

ENDORSED

Pay to the order of the Bank of the Canal Zone,

American Trade Developing Co.

p. p. R. Arias F.

(Sgd.) G. Arias.

President, Treasurer, & Manager.

Pay Continental Banking & Trust Co. or order Bank of the Canal Zone, Panama, R. P.

The defendants claim that they had a contract with the Republic of Panama for doing the work of the Javillo fill, and that the firm of Pearce & Sexton had a subcontract with them for doing certain portions of the work in question, and that it was incumbent upon the defendants to make all purchases of cement for the work in question, and that they did purchase the cement and the bags here in question from the American Trade Developing Co. on April 7, and that the empty bags became and were their property, so that they are entitled to the sum realized therefor and which is now in the hands of the Auditor of The Panama Canal.

It is plaintiff's contention that by virtue of a certain contract between the defendants and the Continental Banking & Trust Co. and the Bank of the Canal Zone these institutions were to finance the work in question and that all material purchased by the defendants for said work was in effect to be paid for primarily by the banks out of their own funds by checks, however, drawn thereon by Rodriguez & Uribe, the bank to recover its agreed percentage on account of the money advanced, and also its agreed proportion of the profits of the enterprise, so that purchases made by Rodriguez & Uribe, although paid for by their checks upon these banks, were in effect purchases made by the parties financing the enterprise.

Eliminating from consideration this broad contention on behalf of the plaintiff, which does not seem very clear from the evidence adduced at the trial, the following facts would appear from this particular much-involved transaction. That the plaintiff had on a previous occasion borrowed from the American Trade & Developing Co. a quantity of

cement for the construction of houses in Colon, and that he afterwards bought the 4,000 bags (double) of cement from the general storekeeper of The Panama Canal at Balboa, which he returned to the American Trade Developing Co. That he did so purchase this on the 5th of April, 1916, is apparent from the affidavit of the auditor, and also from the testimony of the plaintiff to the effect that he paid therefor the sum of \$2,332.50, and thereafter the sum of \$30 for switching charges, and also the sum of \$532.25 in favor of the Panama Railroad Co. for freight on the same from Colon to Panama. It is also clear that the plaintiff did thereupon deliver the same to the American Trade Developing Co. in return for cement theretofore borrowed by him from that company. It also appears that at the time this cement in question was purchased from the American Trade Developing Co. the value of cement in barrels in Panama was \$7.80 silver per barrel, and that the cement in question was purchased from the American Trade Developing Co. for \$7.50 silver per barrel. It seems that the plaintiff arranged for the purchase of the cement from the company at this price, he advising the defendants that it could be purchased and delivered to them at this price but with the understanding that the empty bags would be returned. It also appears that all purchases were made by Rodriguez & Uribe pursuant to certain acts or authorizations of those financing the enterprise, and that this particular cement was purchased pursuant to Act No. 34, a translation from Spanish to English being as follows:

No. 34

Voucher No. 62.

Messrs. Rodriguez & Uribe are authorized to purchase 1,000 barrels cement at \$7.50 silver each, or be it \$3,750, with return of the empty bags, and 800 cubic yards of gravel at \$1.75 each or be it \$1,400.00 (with

Total five thousand one hundred and fifty dollars gold.....	\$5,150.00
---	------------

Panama, April 7, 1916.

Jose Rodriguez y R.

Sam Uribe

Bank of the Canal Zone, Panama, R. P.

R. Arias F. jr.

Jose Sandi

Continental Banking & Trust Co.

C. W. Rennert, Accountant.

It will be noted that the act expressly authorizes Rodriguez & Uribe to purchase 1,000 barrels of cement at \$7.50 silver, or \$3,750, and that it is expressly stated in the act, "con devolucion de los sacos vacios," or, "with return of the empty sacks." It is claimed by the defendants that this was subsequently written into the act by the plaintiff himself, and this is in effect admitted, the plaintiff stating that he wrote the same therein as soon as the matter came to his attention because of the fact that he was obligated to return the sacks to the

American Trade Developing Co., or, in other words, because he himself had delivered the 4,000 sacks to the American Trade Developing Co. with the understanding that the sacks were to be by them returned to The Panama Canal for the credit of plaintiff's account. This would seem to be borne out by the evidence that the market price of cement in barrels in Panama was at that time \$7.80 silver instead of \$7.50 silver. In other words, that the defendants could not have purchased in Panama at that time 4,000 bags (double), including title to the bags themselves, for the sum of \$7.50 per barrel, but that this would have cost at that time at least the sum of \$7.80 silver per barrel. In other words, the facts and circumstances of the case would seem to indicate that the cement in question from which the bags originated was sold at a price which excluded the value of the bags, and that, therefore, the party selling the same was entitled to the return thereof. Furthermore, the books of the American Trade Developing Co. show a transaction for the sale of the cement to Ramon Arias F. jr., and the Continental Banking & Trust Co. The entry appearing in the petty ledger of the company of date May 22, 1916, is as follows:

Ramon Arias F. jr. & Continental Bnkg. & Trust Co.

1916			
May 22	204	To 4000 bags (double bags) of Atlas cement at 7.50 per barrel (4) bags....	\$7,500.00
		To 8,000 empty bags at 17c.....	1,360.00
			<hr/>
			\$8,860.00
			Paid by check upon the Continental Banking & Trust Co.
			\$7,500.00
			This account has transferred to the ledger No. 5, fo. 144
			\$1,360.00
			<hr/>
			\$8,860.00

And the entry appearing in the major ledger of the same date is as follows:

CONTINENTAL BANKING & TRUST CO.

1916			
May 22	204	To 4,000 bags (double bags) of Atlas cement at \$7.50 per barrel (4 bags).....	\$7,500.00
" "	204	To 8,000 empty bags, the value of which is not included in the above entry because they are to be returned (17c).....	1,360.00
		Paid by check upon the Continental Banking & Trust Co.....	\$7,500.00

In a pencil note appearing upon the ledger is the following:

(Note: The bags are not included in the price, and if the bags are not returned they shall be charged for at the rate of 17c each. (In pencil) The Continental Banking & Trust Co. (Rodriguez & Uribe contract) (In pencil.)

So from the books of the company it would appear that the transaction was with Ramon Arias F., jr., the plaintiff herein, on behalf of the financiers, and that it expressly appears in the entry that the sacks were to be returned, and, although they were paid for by check of Rodriguez & Uribe, it is explained that this was the customary mode of dealing pursuant to the credit which the financiers were extending Rodriguez & Uribe, and this would seem to be further borne out by the express authorization granted in Act No. 34, heretofore referred to.

There is also testimony to the effect that the cement in question was delivered alongside the old American wharf directly to Pearce & Sexton, contractors under Rodriguez & Uribe, and that they, Pearce & Sexton, received the cement with instructions to return the empty bags to the general storehouse at Balboa for the account of the plaintiff, and that when Mr. Sexton of this firm had given orders to have the cement bags loaded on the cars of the Panama Railroad Co. to be returned to Balboa for the account of the plaintiff, Mr. Jose Rodriguez brought suit against Sexton, claiming the ownership of the bags. There is testimony that would indicate that this suit was dismissed in the court of the Superior Judge of Panama, but, notwithstanding, the defendants seemed to have obtained possession of the bags for the purpose of delivering the same to The Panama Canal.

The check of Rodriguez & Uribe in the sum of \$3,750 of April 7, 1916, constitutes by far the strongest evidence in favor of the defendants in this case, but, looking at the transaction between the plaintiff and the American Trade Developing Co., by which plaintiff agreed to deliver to that company only the cement contained in the sacks, and looking to the authorization of Rodriguez & Uribe to purchase the cement, contained in the said Act No. 34, in which it was expressly stated that the sacks were to be returned, and looking also to the books of the American Trade Developing Co., which show this to be the fact, and also considering the fact that \$7.50 per barrel would be a fair market price for the cement without the sacks, and that cement at that time could not have been bought so cheaply with the sacks, I am led to the conclusion that the plaintiff from the time he purchased the same from The Panama Canal never parted with the ownership of the sacks to The American Trade Developing Co., and that the American Trade Developing Co. never parted with the ownership thereof when it sold the cement to Rodriguez & Uribe, but on the contrary, it was sold with the express understanding that the sacks were to be returned.

The Court, therefore, finds that the plaintiff herein is entitled to the value of the sacks in question; that is, to the said sum of \$638.77 now in the hands of the Auditor of The Panama Canal, and judgment in favor of plaintiff may be taken accordingly without costs.

The Court, however, is of opinion that the plaintiff's claim for consequential or indirect damages herein in the sum of \$250 is not maintainable in law, and this portion of the plaintiff's claim is, therefore, denied.

GREENIDGE *versus* PANAMA RAILROAD COMPANY.

(District Court, Canal Zone, Cristobal Division, February 12, 1917.)

Civil No. 45.

1. MASTER AND SERVANT. FEDERAL EMPLOYERS' LIABILITY ACT.

The Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, is not in force in the Canal Zone.

2. MASTER AND SERVANT. EMPLOYERS' LIABILITY ACT FOR THE CANAL ZONE.

Section 5 of the Panama Canal Act, approved August 24, 1912, and Executive Order of March 20, 1914, provides the exclusive remedy for Panama Canal and Panama Railroad employees for the recovery of compensation for personal injuries sustained while in the course of employment of the said Panama Canal or Panama Railroad.

3. LAWS CANAL ZONE. CONSTRUCTION.

Laws of the Canal Zone where doubtful should be construed in harmony with the laws of the United States.

[NOTE]. This decision is nullified by decision of Circuit Court of Appeals in P. R. Co. *vs.* Minnix, 282 F. 47, and P. R. R. Co. *vs.* Strobel, 282 F. 52. See also P. R. R. *vs.* Rock, 266 U. S. 209.

Attorney for plaintiff, *V. E. Bruno*.

Attorney for defendant, *C. R. Williams*.

JACKSON, District Judge. The plaintiff complains that on June 18, 1914, he was an employee of the Panama Railroad Company and that while so engaged in his duties of passing cement and mortar to certain workmen of the defendant company, working on a scaffold about 26 feet high, and by reason of the negligence of the said defendant company, or its officers, agents, or employees, and by reason of the defect and insufficiency, due to its negligence in certain of its works and equipments, he sustained serious personal injuries to his damage, for which he prays judgment for \$7,500, U. S. C.

The third paragraph of the complaint states specifically that the action is brought under and by virtue of the provisions of the Act of Congress of April 22, 1908, known as the "Federal Employers' Liability Act." To this complaint the defendant interposes a demurrer upon the following grounds:

First. That section 5 (subsection 10), of the Act of the Congress of the United States, known as "the Panama Canal Act," approved August 24, 1912, provides as follows:

The President shall provide a method for the determination and adjustment of all claims arising out of personal injuries to employees thereafter occurring, while

directly engaged in the actual work in connection with the construction, maintenance, operation, or sanitation of the Canal, or of the Panama Railroad, or of any auxiliary canals, locks, or other works necessary and convenient for the construction, maintenance, operation or sanitation of the Canal, whether such injuries result in death or not, and prescribing a schedule of compensation therefor, and may revise and modify such method and schedule at any time; and such claims to the extent they shall be allowed on such adjustment, if allowed at all, shall be paid out of the moneys hereafter appropriated for that purpose, or out of the funds of the Panama Railroad Company, if said company was responsible for said injury, as the case may require.

And in pursuance of said act of Congress, the President of the United States, by Executive Order, dated March 20, 1914, effective April 1, 1914 (E. O. 165), has provided a method for the determination of such compensation and a schedule therefor, and in section 2 thereof has provided further that such method and schedule shall be the exclusive remedy of the injured employee.

It is further provided in section 30 of said Executive Order that:

The Governor of The Panama Canal shall make all necessary rules and regulations for the proper, effective and economical enforcement of this order, and shall decide questions arising under this order, or in regard to the interpretation thereof. His determination of any fact necessary to or underlying any claim hereunder shall be final and conclusive.

And by section 33 of said Executive Order, it is further provided:

All laws of the Canal Zone inconsistent with any of the provisions of this order are hereby repealed.

And on April 1, 1914, by Circular No. 668, the Governor of The Panama Canal, in compliance with said Executive Order, has provided the necessary rules and regulations for the proper and effective enforcement of said Executive Order, and has provided a method by which an injured employee may present and have determined his claim for injury compensation.

Notwithstanding that the Executive Order of the President of March 20, 1914, provides in section 2 thereof that the method and schedule therein provided shall be the exclusive remedy of injured employees, the plaintiff insists that the Panama Canal Act did not specifically so provide and that the President, in so providing, by Executive Order, was in effect, making new and substantive legislation not authorized by Congress; for which reason plaintiff contends that in addition to his rights under said Executive Order of March 20, 1914, he is entitled to pursue his remedy in this court, pursuant to the general law existing in the Canal Zone for that purpose.

The right of action in all such cases was originally predicated upon the President's letter of May 9, 1904, as follows:

The laws of the land, with which the inhabitants are familiar and which were in force February 26, 1904, will continue in force in the Canal Zone and in other places on the Isthmus, over which the United States has jurisdiction, until altered or annulled by the said Commission.

This necessitated a resort to and enforcement of the provisions of the Civil Code in existence on February 26, 1904. However, in the case of *Fitzpatrick vs. The Panama Railroad Co.*, 2 C. Z. Rep., 111, which was an action to recover damages on account of personal injuries received, the Supreme Court of the Canal Zone stated as follows:

But we also recognize the fact that the Canal Zone is largely peopled by Americans and that American ideas, methods, modes of living, and conduct of business, predominate in the Canal Zone, and that, so far as may be reasonably done, the laws here should be given a construction in keeping with those in the States.

These laws as promulgated by the President on May 9, 1904, and as construed and enforced by the courts, were afterwards modified in certain respects by the provisions of the Panama Canal Act, creating a permanent government for the Panama Canal Zone, and one of the express provisions of that act was to authorize and require of the President, the promulgation of a method for the determination and adjustment of *all* claims arising out of personal injuries to employees of the Canal or Panama Railroad under certain conditions. In other words, it would seem that Congress intended that there should be substituted for the laws here existing in this respect, what is generally known as a workmen's compensation act, and that the President was empowered and required by act of Congress, to put the provisions of such an act into effect. This the President did by Executive Order of March 20, 1914, declaring at the time that such method and schedule shall be the exclusive remedy of an injured employee.

In practically all of the States where workmen's compensation laws have been enacted, it has been the purpose of the legislature to make such laws the sole and exclusive remedy of the workmen on the one hand, and to constitute an absolute obligation as against the employer on the other, thereby abolishing the old remedies at law, together with the old defenses. It is reasonable to suppose that Congress, in legislating as above stated, for the Canal Zone, had a like purpose in view. Indeed the wording of the act itself would indicate that the President in the promulgation of his Executive Order, was fully authorized and empowered to declare that it should be the exclusive remedy of the injured employee. As stated by counsel for the defendant, this question must have received the consideration of the President himself and of the Attorney General of the United States.

While the complaint states that the action is brought under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, it must be said that the well-known purpose of this act was to create an absolute liability as against the employers for injuries resulting from the negligence of any of their officers, agents or employees, and to abolish thereby the old defenses of "fellow-servant," "contributory negligence" and "assumed risks." But there was nothing

in this act that could prevent Congress from establishing by further legislation, the mode and manner in which such recovery was to be had, and prescribing the schedule thereof. In other words, taking it out of the hands of the court and putting it in the hands of the Governor as has been done by the Panama Canal Act, and the Executive Order of the President.

It follows that the demurrer to the complaint must be and the same is hereby sustained.

HUMBER, Administrator, *versus* SMITH, Auditor.

(District Court, Canal Zone, Balboa Division, March 3, 1917.)

Civil No. 130.

1. MANDAMUS. AUDITOR THE PANAMA CANAL. MINISTERIAL DUTY.

Where the Joint Commission, provided for by treaty between the United States and the Republic of Panama, has title to land expropriated by the United States, and the umpire has awarded the value thereof, and an appropriation has been made for payment of such claims and the money is in the hands of the Auditor of The Panama Canal for payment, the duty of the auditor is purely ministerial and mandamus will lie to compel payment.

2. TREATIES. AWARD BY JOINT COMMISSION UNDER TREATY.

An award by arbitrators acting under the provisions of a treaty is conclusive except for fraud or corruption or lack of jurisdiction.

3. JURISDICTION. SUIT AGAINST THE UNITED STATES.

Under the facts in this case, following the rule of *Jackson vs. Smith* (241 Fed., 747), it is held this is not a suit against the United States and that the court has jurisdiction.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorney for defendant, *Charles R. Williams*.

JACKSON, District Judge. The complaint prays that a writ of mandamus under the seal of this court be directed to the respondent, Auditor of The Panama Canal, commanding him forthwith to issue and deliver unto relator his warrant, voucher or certificate directed to the Paymaster of The Panama Canal for the payment to relator of the sum of \$30,000, United States currency, together with interest from the 7th day of September, 1916, at the rate of six per cent per annum, in conformity with the award of the umpire of the Joint Commission.

As reasons for the prayer for the writ of mandamus herein the complaint alleges that on the 10th day of July, 1916, the members of the Joint Commission having been unable to arrive at an agreement as to the value of the said land and improvements of the said John McGregor, deceased, but having agreed that title in and to the said 600 hectares of land, together with all improvements therein, vested in the aforesaid claimant, John McGregor, did sign a certain certificate

of disagreement upon which the claim aforesaid was passed to the Honorable Victor Maria Concas y Palau, Vice Admiral of the Spanish Navy, duly appointed by His Majesty the King of Spain, upon the request of the Government of the United States and the Republic of Panama, as umpire of the Joint Commission. Also, that under date of the 7th day of August, 1916, the umpire aforesaid rendered an award No. 123, in favor of relator as administrator of the estate of John McGregor, deceased, against the United States for the sum of \$30,000, United States currency, with interest thereon from the 7th day of September, 1916, at the rate of six per cent per annum until paid.

Further, it is alleged that by Act of Congress approved March 3, 1915, sufficient funds were appropriated to pay the total amount of relator's claim, together with interest thereon from the 7th day of September, 1916, at the rate of six per cent per annum, and that the funds appropriated as aforesaid are now available for the payment to relator of the total amount of said award, with interest thereon, which said funds are now under the control and custody of the respondent, the said H. A. A. Smith, Auditor of The Panama Canal, whose legal duty it was and is to audit, issue, and deliver to relator the warrant or voucher for the payment of the said award of \$30,000, together with interest thereon from the 7th day of September, 1916, at the rate of six per cent per annum.

Also, that demand has been made upon respondent, Auditor of The Panama Canal as aforesaid, that he issue to relator as the administrator of the estate of John McGregor, deceased, his warrant, voucher or certificate on the Paymaster of The Panama Canal for the sum aforesaid, which the said auditor refused and still refuses to do, alleging that one Frank Feuille, special counsel, has refused to sign a certain certificate, and that until said certificate be so signed he, the said respondent, as Auditor of The Panama Canal, will not issue the voucher or warrant for the sum aforesaid, pursuant to the award of the umpire of the Joint Commission.

The defendant interposes a demurrer for a number of reasons as follows:

1. Under the facts stated in said complaint relator is not entitled to the writ prayed for, nor to any other writ or relief as against respondent.

2. It does not appear that any specific appropriation has been made by the Congress of the United States to pay said award.

3. It does appear from the allegations of said complaint that the special counsel of the United States Government, acting on behalf of the political and executive branch of the Government, has refused to sign a certificate acknowledging and accepting said award.

4. Because relator has another and a different adequate remedy;

5. Because said complaint is in effect a suit against the United States;

6. Because respondent is not a final or independent auditor, but an administrative auditor, and not subject to mandamus in said cause.

7. Because the Auditor of the Treasury Department of the United States, known as the Auditor for the War Department, is the legal Auditor of The Panama Canal.

The first ground of demurrer does not merit any consideration whatsoever. As to the second, paragraph 9 of the complaint specifically alleges that sufficient funds were appropriated to pay the total amount of relator's claim, and that said funds are now under the control and custody of the respondent above named. This is all sufficient. Congress could not have been expected to appropriate the specific sum of \$30,000 for the payment of the McGregor claim because it could not have known what amount the Joint Commission or the umpire would allow in settlement of this claim. It was sufficient that there should be a general appropriation of funds to meet claims pending before the Joint Commission.

Paragraph 11 of the complaint does in fact allege substantially that the auditor refuses to pay the amount because the said Frank Feuille has refused to sign a certain certificate therefor. But this we think is entirely immaterial. Whether the said Feuille refused or did not refuse to sign a certificate calling for the payment of the sum in question has no bearing upon the legal obligations of the respondent herein.

As to the other grounds of demurrer, namely:

4. Because relator has another and a different adequate remedy;
5. Because said complaint is in effect a suit against the United States;
6. Because respondent is not a final or independent auditor, but an administrative auditor, and not subject to mandamus in said cause;
7. Because the Auditor of the Treasury Department of the United States, known as the Auditor for the War Department, is the legal Auditor of The Panama Canal.

It is sufficient to say that each of these questions was presented and elaborately argued and carefully considered and determined in the mandamus suit No. 107 pending in this court, and the decision of Judge Henry D. Clayton, United States District Judge, specially designated by the President to decide the issues of that case, would appear to be controlling as to these grounds of demurrer. Especially is this so in view of the fact that the United States Circuit Court of Appeals at New Orleans has in all respects affirmed the opinion of Judge Clayton rendered in the aforementioned case. The question as to whether or not such a proceeding is a suit against the United States, and that respondent is not a final or independent auditor, or that the Auditor of the War Department is such final or independent Auditor of The Panama Canal, have all been fully discussed, considered, answered and determined, so that the question is no longer open for dispute.

It may be remarked, however, that it is not necessary to determine the question as to whether the respondent is or is not a final or independent auditor but merely an administrative auditor. In mandamus

proceedings of this nature the controlling question is, who is the official upon whom devolves the ministerial duty of performing the specific act which is desired to be enforced by mandamus? The question of final or independent auditor is purely academic. All the allegations of the complaint herein show that the respondent is the auditor charged with the ministerial duty of paying the amount awarded by the umpire of the Joint Commission.

It will be noted that the complaint alleges that the Joint Commission itself agrees that the title to the 600 hectares of land in question belonged to John McGregor, deceased, and only the question of the value thereof was submitted to the determination of the umpire. It seems apparent, therefore, that pursuant to the terms of the treaty between the United States of America and the Republic of Panama, ratified under date of February 23, 1904, the decision of the Joint Commission itself as to the title of the property in question and the decision of the umpire as to the value thereof, were final and conclusive, and the money being appropriated by Congress to meet the award, there remains nothing to be done except the ministerial duty which devolves upon the auditor to issue his warrant or voucher in payment of the same. We think it is elementary that the awards of international tribunals in such cases are final and conclusive unless they exceed their jurisdiction, or unless fraud or corruption has entered into the determination of the questions. No excess of jurisdiction is apparent in the pleadings, and it is hardly conceivable that any one could have the temerity to allege fraud or corruption. The principle has been decided by the United States courts in the States in the case of *La Ninfa*, 75th Federal Reporter 513, as follows:

An award by arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted, becomes the supreme law of the land, and is as binding on the courts as an act of Congress.

And in the case of *Comegys vs. Vasse*, 7th Law Ed. 108, it was held as follows:

The object of the treaty was to invest the commissioners with full powers and authority to receive, examine and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision within the scope of this authority is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reexaminable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction.

At the hearing of the instant case upon demurrer there was submitted to the court by special counsel for The Panama Canal a copy of a cable which reads as follows:

Washington, D. C.,
November 10, 1916.

HARDING—PANAMA:

Referring to your cable of the 4th instant—Referring to your cable of the 9th instant, Department of State approves action by Special Attorney in McGregor case and his action in declining to certify for payment entire case is to be submitted to Department of State for its consideration.

BROWN.

And it was sought by this means to demonstrate that this court is without jurisdiction in the premises by reason of the fact that the matter in controversy has become the subject of diplomatic relations between the Governments of the United States and of Panama, but the cable in question is not sufficient to show that diplomatic relations have in fact been initiated between the two Governments; that the Government of the United States has proposed the same to the Government of Panama, or that the Government of Panama has acceded thereto. Nor does it appear that representations were made to the Government at Washington which induced the sending of the aforesaid cable. Furthermore, it may be stated that practically four months have passed since the receipt of the aforementioned cable, during which time this court has patiently waited in order to be advised as to what, if any, diplomatic correspondence was to be undertaken between the two Governments looking to an opening up and a revision of the award in question. As yet it has not been advised of any agreement reached or even of any diplomatic steps taken looking to this end.

This court is constrained to view the decision of the Joint Commission itself as to the title, and the decision of the umpire, appointed pursuant to the terms of the treaty, as final and conclusive, and the demurrer of the respondent herein is therefore overruled.

MOYERS *versus* THE PANAMA ELECTRIC CO.

(District Court, Canal Zone, Balboa Division, May 11, 1917.)

Civil No. 163.

JURISDICTION. PERSONAL INJURY.

The defendant company operates a street railroad in the Republic of Panama, which extends into the Canal Zone, and it does business in the Canal Zone. One of its cars inflicted a personal injury on the plaintiff in Panama. The plaintiff was not an employee of defendant, *Held*—

1. That the court has jurisdiction of the action.
2. That the case of *George vs. United Fruit Company*, 3 C. Z. Rep. 20 is distinguishable from and does not control this case.

[NOTE]. See 249 Fed. 19; 259 Fed. 219.

Attorney for plaintiff, *E. M. Robinson*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. The question here arises upon the plea to the jurisdiction of the court, it being contended that the District Court of the Canal Zone is without jurisdiction because the damage complained of occurred in the City of Panama.

In passing upon a somewhat similar case, that of William George *vs.* the United Fruit Company, this court said:

Therefore, basing the decision in this case upon the matter of discretion it must be said that the courts of our sister Republic, Panama, where the wrong was alleged to have been committed, and where the plaintiff lives, are open to the plaintiff. The defendant maintains its offices in the Republic of Panama and conducts its business therein. The contract of service was entered into and to be performed in the Republic of Panama. The alleged injury occurred while acting as an employee in the service of the railroad of the defendant in Panama, which said railroad does not extend into the Canal Zone, and it would seem that under all these circumstances, that this court should not take upon itself to determine the controversy but that justice would better be served by leaving the plaintiff to seek his remedy in the Republic in which he resides.

In the case above referred to the plaintiff, William George, was not a citizen of the United States, but was, moreover, an alien nonresident. It will, therefore, be noted that the George case differs extensively from the case at bar for in that case the defendant's railroad did not extend into the Canal Zone and it conducted no railroad business therein, and, moreover, the plaintiff sued as an employee of said company, having had a contract of service as such employee, whereas, in the present case the defendant's street railroad extends into the Canal Zone, and it has property and does business as such railroad in the Canal Zone, and the case does not involve any question of employer and employee but is an action for tort for damages arising from a collision in the streets of Panama.

We think the present case is sufficiently distinguished from the George case to permit this court to take jurisdiction thereof, and the plea to the jurisdiction is, therefore, overruled.

JUDD *versus* SEXTON, *et al.*

(District Court, Canal Zone, Balboa Division, May 26, 1917.)

Civil No. 138.

1. EMPLOYER AND EMPLOYEE. BREACH OF CONTRACT. ACTION.

An action by an employee against his employer for breach of contract of employment is indivisible and successive actions can not be maintained thereon.

2. EMPLOYER AND EMPLOYEE. BREACH OF CONTRACT. ACTIONS.

Where plaintiff was employed by defendant at a monthly salary, plus a bonus upon certain conditions, and plaintiff was discharged before the contract was

completed, and sued for a breach of contract for wages earned and for the bonus which might have been earned if contract had been completed, and the jury gave plaintiff a verdict for wages and the bonus, and the court on motion for new trial required the plaintiff to reduce the recovery to the wages earned, excluding the bonus or submit to an order granting a new trial, and the plaintiff did so reduce the amount of his verdict and a judgment was entered therefor, *held*, that the plaintiff can not thereafter maintain another action for such bonus because the action for breach of the contract is indivisible and because his stipulation excluding the bonus from the verdict in the first action bars his right to maintain the present action therefor.

Attorney for plaintiff, *Hinckley and Ganson*.

Attorney for defendant, *Dr. H. Arias*.

JACKSON, District Judge. In January, 1915, the plaintiff herein, Frank H. Judd, instituted in this court civil action No. 95 against the above-named defendants, Sexton and Pierce, wherein he sought to recover the sum of \$2,300 United States currency as damages arising from a breach of contract of employment. The complaint set forth a verbal contract between the defendants and the plaintiff and one Samuel M. Perkins, by the terms of which the plaintiff Judd was to receive the sum of \$300 United States currency per month for services rendered in constructing a certain fill as well as a bonus of \$250 United States currency per month provided 50,000 cubic yards of dirt per month were placed in the said fill, and an additional amount of one-half cent per cubic yard for all amounts of dirt in excess of 50,000 cubic yards so placed. The complaint then alleged that the defendants "without any provocation or cause whatsoever, discharged this plaintiff without furnishing him an opportunity of completing the contract aforesaid. Also that the plaintiff at the time of his discharge as aforesaid was performing his contract with the defendants in a satisfactory manner and that his discharge was without just cause and that the act of discharging the plaintiff by the defendants constituted a violation of the terms of the agreement entered into by and between the plaintiff and the defendants as aforesaid."

"That by reason of the act of the defendants in failing to comply with the terms of the contract aforesaid the plaintiff has been damaged in the sum of \$2,300 United States currency."

The jury empaneled to try the case rendered a verdict in favor of the plaintiff and assessed his damages in the sum of \$1,825. This verdict included the bonus of \$250 per month for the months of February, March, and April. In fact, the verdict of the jury found for the plaintiff for the full amount of his claim less the amount of wages which he was receiving in the meantime; that is, the sum of \$125 per month. This latter sum, under instructions of the court.

the jury did not allow. As the trial was held in February, 1916, it was considered by the court that the allowance of the bonus of \$250 a month for the months of February, March, and April, was premature and could not have been sustained by any evidence adduced at the trial of the case. Therefore, upon motion for a new trial, the court made and entered the following order:

Upon a careful reconsideration of all the facts adduced at the trial of the above-entitled case the court is of the opinion that there was not sufficient evidence to justify a verdict of the jury for the bonus of \$250 per month referred to in the contract, for the period of three months, and that the finding of the jury, so far as this item was concerned, was in fact against the weight of the evidence. The earning of a bonus of \$250 a month for the months of February, March, and April was not established by any sufficient evidence in the case, and, in fact, it could not be during the pendency of the work and before the completion of the contract. In fact, during that period of time many elements might occur to show that such bonus could not have been earned, but at least it must be said that it was not shown that this bonus could have been earned by the plaintiff. This element of damages found by the jury in their verdict, therefore, seemed to be contrary to the weight of the evidence, and it is therefore, ordered that the motion for the new trial herein be and the same is hereby granted *unless* within 10 days from the date hereof the plaintiff by his counsel stipulate in writing, consenting to a reduction of the verdict from the sum of \$1,825 to the sum of \$1,075. Upon the filing of such stipulation by the plaintiff the motion for the new trial will be overruled.

And pursuant thereto the plaintiff by his attorneys, filed in court the following stipulation, consenting to the reduction of the verdict from \$1,825 to \$1,075:

Whereas this cause came on for trial on the 12th day of February, 1916, before a jury duly empaneled, and whereas the jury rendered a verdict in favor of the plaintiff and against the defendants in the sum of \$1,825, and whereas the court has entered an order to the effect that a motion for new trial would be granted unless the plaintiff stipulated that the amount of the verdict be reduced from the said sum of \$1,825 to the sum of \$1,075.

NOW, THEREFORE, the above-named plaintiff, by counsel, hereby consents to the reduction of the verdict from the sum of \$1,825, to the sum of \$1,075, and prays that final judgment be entered for the sum of \$1,075 with costs and interest from the date of the rendition thereof at the rate of six per cent (6 %) per annum.

On November 10, 1916, the plaintiff instituted the present action No. 138, in which he seeks to recover the sum of \$750 by way of bonus for the months of February, March, and April, 1916, at the rate of \$250 United States currency per month. And to this action the defendants interpose a plea of *res judicata*, in which they aver that the subject matter of the plaintiff's complaint was adjudged by this court and such judgment agreed to by the plaintiff's stipulation of March 18, 1916. A reading of the complaint in the original action, No. 95, as well as the present action, No. 138, and a consideration of all the facts and circumstances of the case, are sufficient to show that these actions are for damages by reason of the breach of contract for personal

employment, and it is almost universally held that an action for damages arising out of a tort or for breach of contract is indivisible, and that an action once brought for such damages is a bar to any subsequent proceedings, although further damages may accrue and develop subsequent to the institution of the original action. The proposition of law in this respect is concisely stated in volume 23, Encyclopedia of Law and Procedure, p. 1177, as follows:

A servant or agent wrongfully dismissed from his employment has his election to treat the contract as rescinded and recover for his services rendered, or to sue for breach of the contract; but if he chooses the latter, he must recover all his damages in the one action, and can not thereafter maintain an action either for wages earned or for such as would have been earned in the future.

It would thus seem that, although the plaintiff Judd, in the original action No. 95 brought herein, was limited by the court to the recovery of such damages as he could prove at that time, nevertheless he could not be permitted to bring an action for damages resulting thereafter for the reason that, as stated, such actions are indivisible, and the first is a bar to the second.

But if this be not so, nevertheless, I am convinced that the stipulation of the plaintiff, filed herein, agreeing to reduce the verdict from \$1,825 to \$1,075, constituted a bar to any further right of action that might arise out of the subject matter of the original suit. The plaintiff had his election, either to accept the sum of \$1,075 in full of all matters embraced in said original action, or to decline the same, with the result that the motion for a new trial would then be allowed. Having made his election, we think it must operate as a bar to any cause of action that might subsequently arise, growing out of the matters embraced in the original suit. A case particularly in point in this respect is that of the Nashville, Chattanooga and St. Louis Railway Co. *vs.* United States, 113 U. S., 971, wherein it was held as follows:

1. A decree in equity, by consent of parties and upon a compromise between them, is a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit in which the decree was rendered.

2. A decree in a suit in equity by the United States against a railroad corporation in Tennessee, appearing upon its face to have been by consent of parties, and confirming a compromise of all claims between them before June 1, 1871, including any claim of the corporation against the United States for mail service, is a bar to a suit by the corporation in the Court of Claims for mail service performed before the War of the Rebellion, although at the time of the decree payment to it of any claim was prohibited by law, because of its having aided the Rebellion.

And further, in speaking of the binding force and effect of such stipulations, it was stated by Mr. Justice Gray in that opinion as follows:

But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by consent of the parties, and could not therefore be reversed, even on appeal. Courts of chancery generally hold that from a decree by consent no appeal lies. 2 Dan. Ch. Pr., ch. 32, sec. 1; *French vs. Shotwell*, 5 Johns. Ch., 555; *Winchester vs. Winchester*, 121 Mass., 127. Although that rule has not prevailed in this court under the terms of the Acts of Congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed without considering the merits of the cause. *A fortiori*, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree.

From the foregoing it follows that the defendant's plea of *Res Judicata* must be and the same is hereby sustained.

CORRIGAN, *et al.*, versus SMITH.

(District Court, Canal Zone, Balboa Division, June 2, 1917.)

Civil No. 161.

1. JURISDICTION. PROCESS. SETTING ASIDE SERVICE OF. WAIVER.

Where defendant, a resident of Panama, was served with summons in the Canal Zone and thereafter appeared generally in the action, the right to have service set aside was waived.

2. CREDITORS' BILL.

In a suit to liquidate the affairs of a defunct corporation and marshal its assets for creditors, one or more creditors may prosecute the suit for the benefit of all creditors interested.

3. JURISDICTION. INJUNCTION. PROPERTY OUTSIDE JURISDICTION.

Where real and personal property outside the Canal Zone has been contracted to be transferred in fraud of creditors, the court having jurisdiction of the persons of those about to complete the fraudulent transaction may enjoin such persons from completing the same.

[NOTE.] See decision in C. C. A., 249 Fed., 273.

Attorney for plaintiff, *Hinckley and Ganson*.

Attorney for defendant, *Felix E. Porter*.

JACKSON, District Judge. In view of the importance of the questions herein involved it has seemed to me proper to add by way of a written opinion a brief statement of the facts and the questions of law, in addition to the oral opinion of the Court at the trial hereof.

On the 9th day of April, 1917, the plaintiffs herein, J. A. Corrigan, *et al.*, filed suit in this court in behalf of themselves and of all other creditors and persons interested in the liquidation of the affairs of the Continental Banking & Trust Company, who might wish to come in and be parties, praying that a writ of injunction issue restraining and en-

joining the defendant above-named, John Budd Smith, pending final order of the court, from selling, conveying, transferring or in any manner incumbering the property set forth and described in the exhibits annexed to the complaint, as integral parts thereof, and that, upon final hearing of this cause, the defendant be directed and commanded to execute and deliver to such person or persons as the court might order, good and sufficient deeds or conveyances of title transferring to such person or persons all right, title, and interest that the defendant might have acquired in the property described in the exhibits aforesaid.

Plaintiffs further prayed that the deeds or instruments of sale with clauses of repurchase, copies of which were annexed to the complaint as aforesaid, be set aside, annulled and for naught held, and that the defendant be directed to render unto the plaintiffs or to such person or persons as the court might direct, a full and complete accounting of the rents and profits of the realty aforesaid, and, upon final hearing, that the defendant be directed to pay and deliver unto the plaintiffs, or to such person or persons as the court might direct all amounts which the defendant had collected or which were property chargeable to him. The complaint was verified.

Upon filing of bond, the temporary restraining order issued, and thereafter, on April 18th, the defendant, by counsel, appeared and filed his motion to dissolve the restraining order theretofore issued.

On the 25th day of April, Doctor Lisandro Escobar, the syndic or receiver of the Continental Banking & Trust Company, appointed as such by the Judge of the Fourth Circuit Court of the Republic of Panama, filed a motion asking leave to intervene as a party plaintiff in the cause.

On the 30th day of April, the defendant by counsel, filed his motion to strike the said motion to intervene. Thereafter, on the 3d day of May, the court overruled defendant's motion to strike the motion of the receiver to be allowed to intervene and allowed said receiver to become a party plaintiff.

On April 30th, defendant filed a motion to set aside service, the same together with the motion to dissolve the restraining order being overruled on May 10th, and thereafter defendant on May 10th, filed his answer.

On May 23d, the plaintiffs, by counsel, filed a motion praying the court to issue a citation to the defendant to show cause why he should not be committed for contempt for having violated the court's restraining order theretofore served upon him. Service of citation not having been made on the defendant, this matter must of necessity remain in abeyance.

Before passing upon the merits of the case, in view of the fact that no written opinion was prepared by the court in overruling defendant's motion to set aside the service, the court feels that it is proper to now state the grounds on which such motion was overruled, particularly in view of the fact that the same allegations as contained in the motion to set aside service are relied upon as a special defense in the answer.

The defendant, and his attorney, filed affidavits to the effect that the defendant at the time that he was served with summons, the complaint and the temporary restraining order, in this cause, was in the office of the clerk of the court in pursuance of a request of his attorney for the purpose of taking up with the court certain matters in the case of *Cornet vs. Smith*, the same defendant, which was then pending in this court. However, the affidavits of the attorneys for the plaintiffs, also filed in the above-entitled cause, disclose that no matter or thing connected with the case of *Cornet vs. Smith* was presented to or heard by the court on the 9th day of April, the date upon which service was obtained upon the defendant. Furthermore the docket entries of the clerk of the court establish the fact that there was no matter or thing connected with the said cause of *Cornet vs. Smith* that was set for hearing on the day last mentioned. Consequently the facts upon which the defendant relied to set aside service are not substantiated. Furthermore, the defendant had appeared generally on the 18th day of April, by filing a motion to dissolve the restraining order. Likewise he had filed a motion to strike the motion of the receiver appointed by the court of Panama wherein the latter asked leave to intervene. It was not until later that he objected to the service. The defendant, under the circumstances, must be considered to have waived any objection to the service.

As this court has heretofore stated in the case of *Andrade vs. McFarlane & Coyne*, the decisions of the Circuit Court of Appeals of the Fifth Circuit, must be our guide in all matters. (*Egdell, et al., vs. Felder*, 84 Fed., 69, 5th Circuit.)

Plaintiffs appeared on behalf of themselves and of all other creditors and persons interested in the liquidation of the affairs of the Continental Banking & Trust Company, defendant objected to the plaintiff appearing in this manner, but the court is of the opinion that such pleading is proper.

(*Carpenter vs. Strange*, 35 Law Ed. U. S., 640, 1.c. 643.)

Upon the trial of the cause the uncontradicted evidence showed that the Continental Banking & Trust Company filed a petition in bankruptcy in the Fourth Circuit Court of Panama on the 7th day of February, 1917; that E. F. Bataille, manager of said bank, on the 30th and 31st days of January, and the 1st and 3d days of February, of this year,

by public instrument, executed in the Republic of Panama, sold to the defendant with pact of resale the properties described in the instruments annexed to the complaint, which said instruments were introduced in evidence at the trial of the cause; that subsequent to the date of said transfers and for a period of at least two months the receiver has been unable to collect the rents and profits of said properties and that the defendant for a considerable period of time has been occupying one of the properties as a residence.

Section 161 of the Commercial Code which is in force and effect, both in the Republic of Panama and in the Canal Zone, and which was the law at the date of the execution of the instruments mentioned in the complaint, provides in part as follows:

There can be annulled, at the instance of the creditors, upon proof of their having been executed in fraud of their rights:

1. The transfers of real property under an onerous pretense (*a titulo oneroso*), made within the month preceding the declaration of bankruptcy.

Article 880 of the Commercial Code of the Philippine Islands is practically identical with the article above quoted. Similar statutes exist in the United States.

We think the evidence and the attending circumstances establish that the transfers were effected in fraud of the plaintiffs and without consideration.

Under the circumstances, the court holds that the transfers which the manager of the bankrupt institution purported to effect to the defendant in fraud of the creditors of the bank were null and void; that the defendant acquired no title thereby and that consequently any transfers that may have been or may be executed by the defendant are likewise of no effect at law.

This court recognizes that it is without jurisdiction to enforce any decree with reference to real property situated outside of the Canal Zone, but in this case, the plaintiffs pray the issuance of a writ that will operate purely *in personam*. The defendant was properly served with process and the court has jurisdiction of the subject matter. That the court has jurisdiction in such cases is sustained by the highest authorities.

(*Massie vs. Watts*, 3 Law Ed. (U. S.), 185;

Wharton on Conflict of Laws, Vol. 1, p. 647 et seq.)

The plaintiffs are entitled to judgment and costs. Let the decree be prepared in accordance with the prayer of the complaint.

[NOTE.]—That the Panama Code of Commerce was ever in force in the Canal Zone is open to question. See *P. R. R. Co. vs. Bosse*, 249 U. S., 42.

MORLEY *versus* MANN.

(District Court, Canal Zone, Cristobal Division, June 28, 1917.)

Civil No. 170.

1. LIBEL AND SLANDER. DAMAGES.

Damages for mental anguish and humiliation are recoverable in a libel action.

2. LIBEL AND SLANDER. MALICE.

Malice may be inferred from falsity of the statement and want of probable cause.

3. LIBEL AND SLANDER. EXEMPLARY DAMAGES.

Punitive damages may be allowed in such an action in a proper case.

Attorney for plaintiff, *Felix E. Porter*.

Attorneys for defendant, *Frank Feuille* and *Walter F. Van Dame*.

JACKSON, District Judge. This is a civil action for libel predicated upon the writing by the defendant of and concerning the plaintiff the following letter:

PANAMA RAILROAD COMPANY

Cristobal, Sept. 29, 1916.

Mr. S. W. HEALD, Supt.,
Panama Railroad Company,
Balboa Heights, C. Z.

SIR:

I notice that Mr. Sexton hired John F. Morley on Sept. 22nd in the position of check clerk at \$75 per month. You know that Morley is not entirely right in his mind and it does not appear to me that he would be a desirable employee to place in position, as a check clerk carries a great deal of responsibility. Can you not take care of him in some of your yard offices. This Agency is getting over-run with this class of help.

Respectfully,

(Orig. Sgd.) C. H. MANN,
R. & F. Agent.

Certified a true copy,
(Signature illegible),
Chief Clerk.

The plaintiff claimed that such letter charged him with being a person of unsound mind and that as a result thereof he has suffered great shame and humiliation, and has lost the esteem and friendship of his associates, and that he was, in effect, black listed and prevented from securing employment elsewhere in Panama or the Canal Zone. Each and every fact in issue was by the court left to the determination of the jury; the court in its charge stating to the jury in this respect as follows:

You are the sole judges of the fact in this case. As a matter of fact in the trial of jury cases I try to refrain from forming any opinion as to the essential facts of the case. These facts are solely for the jury.

Upon a consideration of the evidence and the instruction of the court, the jury rendered a verdict in favor of the plaintiff for \$750. At the conclusion of the charge of the court the defendant by his counsel objected to the portions of said charge advising the jury that they might assess pecuniary damages for mental anguish, and exemplary damages or smart money. The defendant, however, assigns other errors in his motion for a new trial, and, although they could only properly be reviewed such errors as were specifically objected to, nevertheless, in view of the importance of the case, and the fact that the amount of the verdict does not permit an appeal to the Court of Appeals at New Orleans, the court has given careful consideration to each and every error alleged by defendants' counsel in his motion for a new trial.

These alleged errors are substantially as follows:

1st. The charge of the court was erroneous because it permitted the jury to find the existence of malice inferentially and not positively and affirmatively.

2d. The court erred in instructing the jury that it could consider the plaintiff's feelings of humiliation, shame, etc., in assessing damages.

3d. The court erred in instructing the jury that they could give the plaintiff smart money or exemplary damages.

The second allegation of error must be considered to have been disposed of by frequent decisions of the Supreme Court of the Canal Zone, as well as of this court, holding that physical and mental pain and suffering are an element of damages in tort actions. This view of the law has also been upheld by the United States Circuit Court of Appeals at New Orleans in the case of *Bosse vs. The Panama Railroad Company* and it must clearly follow that if one may recover for physical and mental pain and suffering in an action for personal injuries he could recover for mental pain and humiliation caused by libel or slander.

The first allegation of error that the jury was permitted by the court to find the existence of malice inferentially and not positively and affirmatively is not so free from doubt, but a careful review of the authorities subsequent to the trial has led me to the conclusion that no error was committed in this respect. Upon this proposition this court in its charge to the jury adopted the view and, in fact, the precise language of the United States Circuit Judge for the District of Minnesota in the case of *Locke vs. the Bradstreet Co.*, which case was at the trial presented to the court by counsel for the defendant as an authority upon this same proposition. This court stated to the jury as follows, quoting from the opinion of the Federal Judge in the *Bradstreet* case:

The publication is submitted for your interpretation, and it is for you to settle the meaning and determine the character and effect of the statement complained of, and whether malice, in fact, is proved.

In a case like this, falsehood of the statement, and the absence of probable cause, will amount to proof of malice; and if you find from the evidence that the published statement was calculated to affect injuriously the plaintiff's character, and was false,

and that the defendant without exercising ordinary care and caution in collecting it, unfairly, and without reason to believe its truth, imparted the information to others recklessly, your verdict should be for the plaintiff. But if you find the plaintiff has not removed the presumption which attaches to this statement as a privileged communication, then the defendant is entitled to a verdict. In determining whether actual malice existed, you can take into consideration the alleged libelous publication, in connection with other testimony tending to show the falsity of the charge and the want of probable cause, and thus determine if malice is proved. If the plaintiff is entitled to a verdict, you are to fix the amount of damages, which must be reasonable and just.

It will be seen that in the Bradstreet case the judge clearly stated that the proof of malice in privileged communications could be inferred by the jury from certain attending facts and circumstances; and from this it would necessarily follow that positive and affirmative proof, as by way of expressed declarations of hatred or ill will, are not necessary to legally establish the existence of malice. Defendant's counsel, however, in his argument upon the motion for new trial laid stress upon the case of *Hemmens vs. Nelson*, decided by the New York Court of Appeals, reported in *Lawyers' Reports Annotated*, book 20, page 441, wherein that court speaking through Mr. Justice O'Brien said, among other things, as follows:

This kind of malice which overcomes and destroys the privilege is of course quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an "indirect and wicked motive which induces the defendant to defame the plaintiff." *Odgers, Libel and Slander*, 267. Unless we can find in the record in this case some proof which would warrant the jury in finding the existence of such wicked motive on the part of the defendant when he made the charge in question, then the direction of the learned trial judge was correct, and the judgment must stand. The question is not whether the charge is true or false, nor whether the defendant had sufficient cause to believe that the plaintiff sent the letter, or acted hastily, or in a mistake, but the question is, the occasion being privileged, whether there is evidence for the jury that he knew or believed it to be false. The defendant may have arrived at conclusions without sufficient evidence, but the privilege protects him from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame her character, under cover of the privilege. The plaintiff must be able to point to some evidence in the record that would warrant the jury in imputing this guilty motive to the defendant before her appeal can be sustained. As malice was an essential element of her case, not to be implied from the charge itself, but, quite the contrary, from the occasion on which it was made, the burden of establishing that fact was upon her.

But a careful reading of this case subsequent to the argument upon the motion for the new trial has convinced me that there is not in fact that apparent inconsistency between the decision of the New York Court of Appeals and the United States Circuit Court for Minnesota. What the New York Court of Appeals really decided was:

To say of a woman merely that she is in the habit of entertaining gentlemen callers at all hours of the night does not, standing alone, necessarily impute unchastity, and is not, therefore, actionable without showing an injurious intent or meaning in the use of the words.

An inuendo is necessary to point to an injurious intent or meaning in the use of equivocal words in making a charge of slander.

And in that case the trial court directed the jury to return a verdict for the defendant because there was no inuendo alleged in the pleading and because, being a privileged communication, there were no facts or circumstances, in the opinion of the court, sufficient to establish the existence of malice, and also because that court does not recognize the doctrine of the scintilla of evidence as being sufficient to warrant the submission of a case to the jury. The New York Court of Appeals speaking on this subject stated as follows:

The most that can possibly be said is that there was a scintilla of evidence on the question of malice, which, under the doctrine of some older cases, was sufficient to carry the case to the jury. But this court is now firmly committed to the more modern and reasonable rule that where there is no evidence upon an issue before the jury, or the weight of evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct a verdict, as the case may require. In a recent decision in which the opinion was given by Judge Gray after an elaborate examination of the authorities, which are there collected, this court has given the fullest assent to the rule.

So it would seem that in the New York case the trial court directed a verdict for the defendant after the conclusion of the evidence offered by the plaintiff because it did not consider that the plaintiff, on her own showing, had affirmatively established malice on the part of the defendant in the sending of the privileged communication in question. But it will be noted that the court does say what we have already quoted as follows:

Unless we can find in the record in this case some proof which would warrant the jury in finding the existence of such wicked motive on the part of the defendant when he made the charge in question, then the direction of the learned trial judge was correct, and the judgment must stand.

Applying that principle to this particular case, if we carefully search the record, looking at all of the evidence offered at the trial of the case, it can not be said that the jury were wholly unauthorized in finding the existence of malice. In the present case the defendant offered a great deal of documentary evidence and also called a great many witnesses to testify orally. Most of these witnesses so called by the defendant himself testified in substance that the plaintiff Morley was, in their opinion, and that he was generally considered to be a man of unsound mind and practically irresponsible. One of the defendant's witnesses testified that he considered him of unsound mind because he invariably carried an umbrella with him on the dock where he was at work, and it was attempted to show that the defendant's mental faculties were permanently impaired by the frequent use of intoxicating beverages. It was also brought out by the defendant, as grounds for the accusation of mental unsoundness, that he did not believe in a man God, but

merely in the existence of some mysterious invisible supreme power. Another witness, the Master of Transportation of the Panama Railroad Co., called by defendant to testify as to plaintiff's mental irresponsibility, interjected the statement that he considered him "a d—— poor railroad man." The jury heard and saw these witnesses called by the defendant, and were, therefore, the sole judges as to whether or not there was more or less malice in the matters affecting this case. The Supreme Court of the Canal Zone in the case of *Denst vs. Gramlich*, 2 C. Z. Rep., 233, has passed upon this precise question. There the court speaking through Judge Brown said:

The women themselves testified that they knew nothing against the virtue of Mrs. Denst. But in almost the same breath they indulged in new slurs against her, and gave evidence of a frame of mind toward Mrs. Denst which, in this court's view, is distinctly indicative of express malice.

This principle, decided by the Supreme Court of the Canal Zone is expressly applicable to the facts and circumstances of this particular case, and these facts and circumstances militate greatly against the decision of the New York Court of Appeals as an authority in this case. In other words, as held in the case of *Hallan vs. the Post Publishing Co.*, 55th and 59th Federal Reporter, and in the *Denst* case, a court or a jury have the right to infer and to find malice from a defendant's insistence in attempting to establish at the trial of the case the truth of the written allegations of which the plaintiff complains.

As to the third contention that the court was in error in instructing the jury that they could give the plaintiff smart money or exemplary damages in the event that they found malice, we have also examined the decisions referred to by counsel for the defendant. The case of *Melendez vs. the Union Oil Co.*, 1 C. Z. Rep., 106, decided by the Supreme Court of the Canal Zone by Judges Gudger and Mutis Duran, was a case of trespass to property, and it may well be said, under Section 2341 of the Civil Code, that actual damages is all that may be recovered in a case of trespass. So in the case of *Spokane Truck Co. vs. Hoefer*, 25 Pacific Reporter, page 1072, the court merely decided that "punitive damages can not be recovered for personal injuries however caused." It is true that the courts in these two cases last above-mentioned considered at length the question of punitive or exemplary damages, but the questions involved were trespass and personal injuries. And in the Porto Rican case, decided by Judge Hamilton, the proposition held was that punitive damages can not be recovered under Section 183 of that Code for damages caused by a wrongful attachment. There too it would seem that if the party were practically recompensed for damages caused by a wrongful attachment nothing more should be expected or demanded. The case most nearly in point, cited by

counsel for defendant, is that of *Murphy vs. Hobbs*, 5 Pacific Reporter, page 119, which holds that punitive damages may not be recovered in an action for malicious prosecution. This case would indeed seem to be an authority in support of the defendant's counsel. But the great weight of authority in England and in the Federal courts of the United States, and in all the States of the Union is decidedly to the contrary. It is not difficult to prove actual damages in the case of a trespass or for personal injuries or for wrongful attachment of property, but it is exceedingly difficult to prove just exactly what pecuniary damages a man has sustained by reason of the loss of his reputation, caused by the publication of a libel. For this reason courts have almost universally held that in actions of libel and slander the party complaining is not limited to the recovery of the actual pecuniary damages which he may be able to establish. This was expressly recognized by the trial court, the judge writing this opinion, in the case of *Denst vs. Gramlich*, wherein she recovered \$2,000 damages without proving one dollar of pecuniary loss, and this principle was at least tacitly recognized by the Supreme Court of the Canal Zone in the affirmance of that judgment. The Supreme Court of the Canal Zone has held in the case of *Reece vs. Shay* that an action for slander can be maintained in the Canal Zone, and Section 42 of the Code of Civil Procedure would seem to expressly recognize and to grant an action for libel because subdivision 4 of said Section 42 says:

An action for injury to the person, action for libel or slander * * * shall be brought within one year after the cause of action accrues.

In expressly recognizing and conceding to the party aggrieved a civil action for libel or slander, it seems to me that it must have been the intention to grant the same with all of their concomitants and all of the rights that naturally flow from them, and one of these rights is the recovery of such damages as a jury may award without being limited strictly to proof of pecuniary loss. In other words, that there is a right to recover such exemplary damages as the jury may award in their discretion under all the particular facts and circumstances of the case.

While regretting that this particular case can not be taken to the Court of Appeals, nevertheless, I can find no error committed at the trial, and the motion for the new trial is, therefore, overruled.

TOPPIN *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division, July 16, 1917.)

Civil No. 96.

1. NEGLIGENCE. PERSONAL INJURY. LIABILITY.

Under article 2341 of the Civil Code of the Canal Zone (adopted from Panaman Codes) one guilty of negligence resulting in injury to another is liable for the consequent damage.

2. NEGLIGENCE. PERSONAL INJURY. DAMAGES.

Damages for pain and suffering may be allowed in case of injury resulting from negligence.

3. NEGLIGENCE. PERSONAL INJURY. DAMAGES.

Plaintiff may not recover damages for tuberculosis arising after such injury unless it is shown that the tuberculosis resulted from the injury.

4. NEGLIGENCE. PERSONAL INJURY. EXCESSIVE DAMAGES.

In tort actions the verdict of the jury fixing the damages should not be set aside by the court on the ground that the damages are excessive unless it appears that such verdict was the result of passion, prejudice or gross mistake or disregard of the evidence or the law.

Attorneys for plaintiff, *W. C. Todd* and *W. C. McIntyre*.

Attorneys for defendant, *Frank Feuille* and *W. F. Van Dame*.

JACKSON, District Judge. At the trial hereof the jury empaneled and sworn rendered a verdict in favor of the plaintiff for the sum of \$10,000 United States currency on account of personal injuries received by the plaintiff as the result of a collision between an engine of the defendant company and a horse upon which the plaintiff was riding at the time. The defendant has filed and orally argued a motion for a new trial, the principal grounds for said motion being:

First. That the court erred in instructing the jury that the plaintiff was authorized to recover under the Panamanian law.

Second. That the court erred in charging the jury that they might consider physical pain and suffering as an element of damages.

Third. That the court erred in its charge to the jury in that portion thereof given in respect to the question as to whether or not the plaintiff has developed tuberculosis of the spine as a result of the injury, and

Fourth. That the damages awarded by the jury were grossly excessive in amount and not justified by the evidence or the law of the case.

With reference to the first proposition the Court charged the jury as follows:

"I charge you that a railroad corporation is responsible for the negligent acts of its employees, agents, and servants, and that it is not the law, as claimed by the defendant that they are not liable, although they may use the greatest care in the selection of their servants, agents, and employees. A corporation acts only through its servants, agents, and employees, and the law holds the corporation responsible for any legitimate and direct consequences of a negligent act of any agent, servant, or employee, however much care it may have exercised in and about the selection of such employees."

As this proposition of law has been repeatedly decided by this court and the Supreme Court of the Canal Zone, and has been expressly affirmed by the United States Circuit Court of Appeals in the cases of *Beckwith vs. the Panama Railroad Company* and *Bosse vs. the Panama Railroad Company*, this alleged error need not be further considered here.

The Court further charged the jury in this respect as follows:

"I charge you that, although a law may make an act of a corporation an offense so that the servants or agents committing it might be fined or dealt with criminally, nevertheless if injury results to one by reason thereof, and if the act, which is punishable under the criminal or municipal laws, is at the same time negligent; that is, one in which they have failed to exercise the proper care, circumspection and prudence under the circumstances, the company may be held liable notwithstanding the fact that the law also provides a criminal penalty."

It would seem that this charge was strictly in accordance with the provisions of section 2341 of the Civil Code which provides, "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, *without prejudice to the principal penalty which the law imposes for the fault or offense committed.*" The objection to this part of the charge can not, therefore, be considered as well taken.

The second objection as to the consideration by the jury of pain and suffering as an element of damages has also been repeatedly passed upon by this court and the Supreme Court of the Canal Zone, and twice by the United States Circuit Court of Appeals, which, therefore, eliminates this objection so far as the action of this court is concerned.

With reference to the third proposition propounded by counsel for the defendant the Court charged the jury as follows:

"He claims that this injury developed tuberculosis of the spine. Now, gentlemen, I charge you as follows: If the plaintiff has developed tuberculosis of the spine as a result of the injuries received, then you may consider such tuberculosis as an element of damages provided, of course, that you find for the plaintiff. By this I mean to be understood as saying that every person is liable for the natural consequences of his own negligence. He is liable for the consequences that might be reasonably expected to follow or flow from his negligence, his negligent acts, and if a person has troubles or infirmities peculiar to himself as distinguished from the generality of us; that is, if he suffers peculiar troubles by reason of an injury as a result of negligence which the generality of us would not suffer, such may not be considered. It is the natural consequences of the act resulting to the ordinary individual that may be considered by the jury in estimating damages. But in that connection you have a right to consider what the doctor said that 75 or 85 per cent have latent infirmities which might be developed as the result of an injury."

The Court in this respect gave to the jury that view of the law most favorable to the defendant. There are many authorities that hold that any and all consequences resulting from a negligent act are recoverable notwithstanding the fact that the party receiving such injury suffered from latent or peculiar infirmities so that the injuries which resulted to him would not have resulted to an ordinarily normal person. There is a decided and irreconcilable conflict of authorities on this proposition, but in its charge to the jury this Court adopted the other view; that is, the view most favorable to the defendant, and charged the jury that they might not consider as an element of damages physical consequences that resulted from latent or uncommon infirmities.

Defendant's counsel in his argument upon the motion for a new trial contended that the charge of the Court was not as full and specific in this respect as it should have been, and that the Court should have specifically charged the jury that if the tuberculosis resulted from causes other than the injury the defendant was not liable therefor. But this idea was clearly embraced in the charge of the Court because the Court charged the jury that they must find affirmatively that the tuberculosis was the result of the injury in order to predicate a claim for damages thereon. Furthermore, the defendant's counsel asked no specific or explanatory charge by the Court to the jury in this respect. If he felt that the subject had not been fully covered by the Court in its charge it was incumbent upon him to direct the Court's attention thereto and ask a specific charge thereon, and a general exception to one entire feature of a charge is not sufficient as a predicate for error. Courts universally hold that the specific matter should be called to the attention of the court by way of a request for a more explanatory charge.

As to the fourth contention, namely that the damages were grossly excessive in amount, the Court will frankly state that the verdict of \$10,000 was in excess of any verdict which it would have rendered had the case been submitted to the Court without the intervention of the jury, but I can not find from the evidence that the verdict of the jury was the result of passion or prejudice, or in utter disregard of the evidence or the principles of law applicable thereto. Under the provisions of the Panama Canal Act either party is entitled upon demand to a jury in any criminal or civil case, and when a jury is had and its verdict rendered, then, upon well recognized principles of law, this verdict should not be set aside or reduced in amount merely because the judge may disagree with the jury as to the amount which they should have rendered. This would be to substitute the verdict of the Court for the verdict of the jury. This is especially so in tort actions. In contract cases a judge may well set aside a verdict of a jury or order a reduction thereof if he considers that the verdict of the jury embraces items or claims upon the contract which are not supported by any evidence, or which are contrary to law, but in tort actions where the jury has once found the general question of liability in favor of the plaintiff and against the defendant the question of damages is one peculiarly for its consideration. For instance, in this case, suppose the Court should set aside the verdict as being excessive and another jury should render a verdict for \$7,500, and suppose the Court should set aside that verdict as excessive, and should continue so to do until the verdict of some jury finally coincided with the opinion of the judge, the result would be to substitute the verdict of the judge for the verdict of the jury in a case where the law has especially provided that the parties

are entitled to a trial by jury, and when the defendant itself, by its attorney, demanded a trial by jury.

The principle above stated has been very generally upheld and approved by Federal and State courts in our country. The proposition can not be better stated than the following quotation from Sutherland on Damages, Vol. 2, page 459, as follows:

Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the Court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the Court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than in the judgment of the Court it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice or gross mistake; or in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation.

The same view was upheld by Judge Hammond of the Federal court in a lengthy and able opinion reported in 90th Federal Reporter 783. To the same effect see 13th Cyc. p. 122, quoting from Mr. Justice Story as follows:

"A verdict will not be set aside in a case of tort for excessive damages, unless the Court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated.

"In actions for personal injuries in deciding whether a verdict is excessive or not, the Court will usually take into consideration whether the injuries are permanent or only temporary. Where it appears from the evidence that the injury complained of has proved or is liable to prove permanent, the appellate courts are little inclined to interfere on the ground of excessive damages. Indeed the courts have gone so far as to refuse interference on the ground of excessive damages not only where there is a probability of permanent injury, but where the evidence shows that a possibility exists. Even where the evidence is conflicting as to the permanency of the injury or where the recovery is doubtful the Court will not set aside a verdict as excessive."

For the foregoing reason it follows that the motion for a new trial must be and is hereby overruled.

SHAW *versus* THE BERGEN POINT IRON WORKS.

(District Court, Canal Zone, Balboa Division, August 6, 1917.)

Civil No. 144.

1. NEW TRIAL. NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted on the ground of newly discovered evidence if the facts in question upon which the motion is based were peculiarly within the knowledge of the moving party, or if with reasonable diligence such facts could have been discovered before trial.

2. NEW TRIAL. EXCESSIVE DAMAGES.

A new trial will not be granted on this ground in absence of a showing that the verdict is palpably excessive, or is unconscionable or such as to lead to the conclusion that it resulted from passion or prejudice. (*Toppin vs. P. R. R. Co.*, 3 C. Z. Rep., 154, followed:

[NOTE]. Reversed by Circuit Court of Appeals, 249 Fed., 466.

Attorneys for plaintiff, *Hinckley and Ganson* and *E. M. Robinson*.
Attorney for defendant, *C. P. Fairman*.

JACKSON, District Judge. The principal grounds relied upon by the defendant herein in his motion for a new trial are, (1st) newly discovered evidence, and (2d) that the damages are excessive. I have given to the consideration of this motion a most careful consideration, and have arrived at the conclusion that the facts constituting the newly discovered evidence, as set forth in the defendant's motion, with the attached affidavits and accompanying photograph, were, or should at all times from the date of the accident to the trial of the case, have been in the possession of the defendant. The newly discovered evidence relates solely to the specific place at which the plaintiff was at work at the time he received his injuries, it being claimed that he was compelled to work in and about an unsafe place in that no scaffold or platform was provided for him to work upon. This was a fact that the defendant could have ascertained at any time because the work was under its direction and control, and other employees of the defendant were at work upon the same place at the time the plaintiff received the injuries in question. Upon well recognized principles of law a party is not entitled to a new trial upon the ground of newly discovered evidence if the facts in question were peculiarly within the knowledge of the party alleging the same, or if they could, with reasonable diligence, have been ascertained before the trial of the case.

2d. As to the claim that the damages were excessive, the court will repeat what was said in the case of *Toppin vs. the Panama Railroad Company*, that the verdict of the jury, namely, \$7,500, is in excess of any verdict that the Court would have rendered if the case had been submitted to the Court without a jury, but the Court does not feel justified in setting aside the verdict because of this difference of view, for, to set aside a verdict for this reason it is necessary that it should be so palpably excessive or so unconscionable as to lead to the conclusion that the jury were actuated by passion or prejudice. Considering the testimony of the Chief Surgeon of the Ancon Hospital as to the probability of a permanent injury to the plaintiff's arm I can not find that the verdict was so manifestly and grossly excessive as to lead to the conclusion of passion and prejudice on the part of the jury.

It follows that the motion for a new trial must be and is hereby overruled.

CARBONE *versus* BRESSIE.

Fairman, MacIntyre, and Enderton, Petitioners.

(District Court, Canal Zone, Cristobal Division, August 6, 1917.)

Civil No. 127.

1. ATTORNEY'S LIEN.

An attorney has a lien on a judgment and the proceeds of the payment thereof procured for his client, in preference to that of all other creditors.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorney for defendant, *C. P. Fairman*.

JACKSON, District Judge. The plaintiffs filed herein on June 20, 1917, their bill in equity wherein they pray that the court decree that "they the said plaintiffs have a valid and existing lien upon the sum of \$1,000 of the amount of said fund paid into court as aforesaid and that the court further decree the enforcement of the plaintiffs' said lien, and that the plaintiffs be paid from the said fund of \$4,500 the sum of \$1,000.00, together with all their lawful costs and expenses in this behalf incurred, expended, and accrued, and for all such other and further relief as to the court may seem just, right, and equitable and the exigencies of the case allow."

Upon a careful consideration of the said bill and the answer filed thereto by counsel for Carlos Carbone, and considering that in the complaint of Carlos Carbone *vs.* P. N. Bressie the relief sought was a personal judgment and not a foreclosure of the mortgaged premises; and considering that the judgment made and entered in said case of Carlos Carbone *vs.* P. N. Bressie by Judge H. D. Clayton on the 6th day of July, 1916, was one for a personal judgment only, wherein it was adjudged as follows:

Wherefore by reason of the law and the finding aforesaid it is ordered, adjudged, and decreed that Carlos Carbone, plaintiff, do have and recover of and from P. N. Bressie, the defendant, the sum of \$8,738.16 Panamanian currency, or the sum of \$4,369.08 United States currency, together with interest from the 6th day of July, 1916, at the rate of 6 per cent per annum, and his lawful costs and disbursements incurred in this action, the same to be taxed by the clerk of the court;

And considering that the lien of this said judgment expired on the 6th of July, 1917, and was not renewed by execution upon the property or otherwise; and considering that the value of the plaintiffs' services is admitted to be at least the sum of \$1,000, and that they had a contract with the said P. N. Bressie for said amount; and considering that the amount paid into court was the result of their legal services so rendered, and that it was in fact the legal services of the plaintiffs that

created the fund and made it possible, the court is of the opinion that the plaintiffs have a prior lien to the amount of \$1,000 to the lien of other creditors, and the prayer of the said plaintiffs' petition in this respect is, therefore, allowed.

MORRISSEY, *et al.*, versus CENTRAL & SOUTH AMERICAN
TELEGRAPH CO.

(District Court, Canal Zone, Balboa Division, August 23, 1917.)

Civil No. 153.

1. TELEGRAPHS AND TELEPHONES. FAILURE TO TRANSMIT MESSAGE. DAMAGES.

The failure of a telegraph company to promptly transmit a message advising an intending purchaser of stock of its probable rise in value, does not give rise to an action for damages for loss of prospective profits. Such damages are purely speculative.

Attorneys for plaintiff, *Fabrega and Arias*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. At the trial hereof the Court at the conclusion of the testimony offered on behalf of the plaintiffs directed the jury to return a verdict for the defendant. The plaintiffs' case was predicated upon a delay in the delivery by the defendant company to the plaintiffs of the following cablegram, to wit:

November 7th, 1915.

NY. 25

New York 53 HG

W. J. Morrissey Camp gaillard Panama C Z

Understand Kathodion Bronze Works about to sign big contract particularly favorable to that concern Think stock will have upward move which should carry it to thirty dollars a share Advise immediate purchase at the market Wire us your orders check to follow.

C. R. Bergmann and Co.

(MC KKPM)

The ruling of the court was that alleged damages arising from the loss of an opportunity of which the plaintiffs might have availed themselves to buy certain shares of stock if they had received such cablegram more promptly was too speculative, remote and uncertain to entitle them to recover against the defendant company.

A motion for a new trial has been made and argued, and a consideration of the authorities leads to the conclusion that no error was committed by the court in instructing the jury to return a verdict for the

defendant. Many cases maintain the view adopted by this court at the trial. In the case of *Cahn vs. Western Union Telegraph Co.*, 48 Federal Reporter, page 810, decided by the Circuit Court of Appeals at New Orleans December 7, 1891, it was decided as follows:

Plaintiff, anticipating a heavy decline in the market price of certain corporate stock, and desiring to speculate in the same by selling on the exchange before the decline began, and thereafter purchasing at a lower figure, delivered to defendant telegraph company, in Columbus, Miss., a message to his brokers in New York City to sell a certain number of shares. The message was not delivered to the brokers until eight days later, during which time the stock had dropped from \$73 to \$55 per share. Plaintiff in fact had no stock to sell, but kept with his brokers securities, on the strength of which they would have sold the stock on exchange, and bought again on plaintiff's order. Held, in an action against the telegraph company to recover the difference in price between the stock at the time the message should have been delivered, and the time it actually was delivered, that the damages were too remote, uncertain and speculative, and there could be no recovery therefor. 46 Fed. Rep. 40, affirmed.

The same principle was decided in the case of *Telegraph Company vs. Hall*, 124 United States, page 444. In that case the message was to buy and not to sell, as in the case of *Cahn vs. the Western Union Telegraph Co.* The message was dated December 9, 1882, and should have reached the sendee at Oil City, Pa., at 11.30 a. m. that day, but the message was not delivered until the exchange had closed for the day, so that Hall could not purchase the petroleum ordered by the plaintiff; and that at the opening of the board the next day the price had advanced from \$1.70 per barrel, the price of the previous day, to \$2.50 per barrel, at which price Hall did not deem it advisable to make the purchase, and did not do so. In this case the Supreme Court held that there could be no recovery because in point of fact the plaintiff had suffered no actual loss. In that respect the Court said:

It is clear that, in point of fact, the plaintiff had not suffered any actual loss. No transaction was in fact made, and, there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th and of making a profit by selling on the 10th; the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would have certainly taken place.

From the foregoing principles it follows that the motion for a new trial hereby must be and the same is hereby overruled.

LEE *versus* MARTIN.

(District Court, Canal Zone, Balboa Division, September 18, 1917.)

Civil No. 169.

1. NEGLIGENCE. PERSONAL INJURY. SPECULATIVE DAMAGES.

Where plaintiff sustains injury resulting from negligence and at the time he is in training to become an officer in the Army but has not yet been commissioned

as such officer, no damages can be allowed based on future possible increase in earnings by reason of compensation paid to such an officer. Such damages are speculative and remote.

Attorney for plaintiff, *E. M. Robinson*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. The plaintiff in his complaint herein alleges that he is a noncommissioned officer in the United States Army with the rank of corporal and that he sustained certain personal injuries by reason of being struck by an automobile owned and operated by the defendant near Corozal on or about the 7th day of May, 1917. paragraph 5 of the complaint alleges "that at the time of the plaintiff's said injuries caused by defendant as aforesaid plaintiff had been nominated for a commission in the United States Army, and was in a training camp qualifying for the same. That as a result of plaintiff's said injuries it will be impossible for him to physically qualify for the position to which he had been nominated."

The jury empanelled and sworn rendered a verdict in favor of the plaintiff in the sum of \$750.

The defendant moved to strike from the complaint the allegations contained in paragraph 5 thereof above-quoted.

At the trial of the case the defendant also requested the court to instruct the jury as follows:

The court instructs the jury that the fact that the plaintiff may have been nominated for a commission in the United States Army, as alleged in his complaint, and that he was in a training camp qualifying to take the examination to become an officer in the Army, can not be considered in assessing damages in favor of the plaintiff.

This request was refused by the court, and defendant's exceptions noted. And in its charge to the jury the court affirmatively stated that the jury might, in assessing any damages to which they might consider the plaintiff entitled, take into consideration the fact that the plaintiff might in all probability have obtained the grade of lieutenant in the Army had it not been for the accident in question. A motion for a new trial has been made and argued, predicated upon the alleged error of the court in this respect. Upon a careful examination of the authorities relied upon and cited by counsel for the defendant the court is satisfied that error prejudicial to the defendant was committed in refusing to strike from the complaint paragraph 5 thereof, and in refusing to give the instruction requested, and in instructing the jury affirmatively as stated.

In *Brown vs. Railroad Co.*, 64 Iowa, page 21, it was held:

The fact that an injured person was in line for promotion from the position of fireman to engineer can not be considered in awarding damages.

In *Freeland vs. Brooklyn Heights R. R. Co.*, 66 N. Y., 321, it was held:

Damages can not be recovered because the disability bars the plaintiff from following a particular pursuit, aside from his vocation, unless he had actually earned money therein.

In *Cauble vs. Central Vermont R. R. Co.*, 216 Federal Reporter, page 712, it was held:

Plaintiff who was a teacher was injured in a collision on defendant's railroad, and brought an action for damages. HELD. That testimony that she intended to take a further educational course and secure an additional degree which would have enabled her to earn a higher salary, but was prevented by her injury was incompetent and its admission was prejudicial to defendant as affording a basis which was more or less conjectural and uncertain for the estimation of damages by the jury.

And in *Ward vs. the Southern Pacific R. R. Co.*, decided by the United States Circuit Court of Appeals for the Ninth Circuit in October, 1913, it was held as follows:

In the course of the trial evidence was admitted to show the provisions of the acts of Congress concerning retirement and promotion of officers of the Army, and Captain Ward was allowed to testify as to the number of actual engagements of war in which he had participated; he was also allowed to compute the amount of money which he would have earned as a captain by the rule of promotion in the Army * * * the age of retirement, 64, is prescribed by statute and, while the court might as a matter of law have stated to the jury what these statutes were, it was not prejudicial error to permit Captain Ward to answer the questions covering the point * * * Captain Ward based his computation as to the probable amount of money which he would have earned upon his actual rank of captain. We think this in no way prejudicial to the railroad company, for it eliminated every element of probable promotion to any rank higher than captain. Upon this hypothesis the earning capacity of a captain of the Army at the age of thirty-five may be arrived at by computation of the salary paid to him at the time of his testimony and up to the age of retirement and adding to it such sums as he may lawfully be entitled to in addition to such salary, such as longevity pay and commutation for quarters.

The Supreme Court of the United States in the case of *Richmond & Danville R. R. Co. vs. Elliot*, 37 Law Ed. U. S., p. 728, in an opinion of Mr. Justice Brewer held as follows:

Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment or even whim of those in control. Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless give weight always to those general probabilities, as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has in fact been deprived of; to show his physical health and strength before the injury, this condition since, the business he was doing, the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that it is not right to go and introduce testimony which simply opens the door to a speculation of possibilities.

And the same principle is also held by the Supreme Court of Georgia in the case of *Allison vs. the Richmond and Danville R. R. Co.*, 11 L. R. A., p. 43.

From all of which it would seem to follow that the measure of damages in the case of personal injuries sustained is to be computed according to the basis of the earnings which the injured party is receiving at the time of the injury and not upon the basis of prospects or probabilities of a promotion to a higher position, carrying with it a higher rate of salary.

From the foregoing it would appear that the court committed an error in the trial of the case prejudicial to the defendant, and it follows that the motion for a new trial must be and the same is hereby granted.

THE PANAMA CANAL *versus* THE SCHOONER "BLANCHE C. PENDLETON." NICHOLSON, Petitioner.

(District Court, Canal Zone, Cristobal Division, December 17, 1917.)

Admiralty No. 176.

1. ADMIRALTY. SALES IN. WHEN TITLE PASSES.

Where a vessel and its cargo are libeled in admiralty and the court has ordered the sale thereof and the marshal has sold the same and the purchaser has paid the amount of his bid but the same has not been confirmed by the court, and where, as a result of a storm and before such confirmation the vessel and cargo are lost, it is held that inasmuch as the property can not be delivered, and as title thereto does not pass until such sale is confirmed, the loss does not fall upon the purchaser and he is entitled to the return of the purchase money paid to the marshal.

Attorney for petitioner, *Charles R. Williams*.

Attorney for respondent, *C. P. Fairman*.

JACKSON, District Judge. The admitted facts of the case as presented for the consideration of the court by the motion to set aside the sale herein are substantially as follows:

That prior to the final determination of the proceeding instituted by The Panama Canal, as libellant, against the schooner *Blanche C. Pendleton*, and pursuant to an agreement of all parties concerned, and of an interlocutory decree made in pursuance of said agreement, the marshal of the Canal Zone on October 5, 1917, offered at public sale the schooner *Blanche C. Pendleton*, her cargo, etc. The petitioner, Capt. G. J. Nicholson, offered for the said schooner the sum of \$1,425 U. S. currency, and for the cargo the sum of \$10, making a total of \$1,435 U. S. currency.

The bid of the petitioner was the best bid offered, and the marshal declared the property sold to the petitioner, subject to confirmation or approval of the court.

On the date of the sale the petitioner deposited with the marshal the sum of \$1,435 U. S. C., said sum being the amount of the bid, but received no marshal's certificate of sale nor any document of title nor was he given possession of the said property.

That subsequent to said sale, and before the property had been delivered unto petitioner, and before he had received or been tendered any certificate of sale or document of title, and before he had the right of possession to said property, and before the sale had been confirmed by the court, to wit: on the 5th of November, 1917, during a severe storm, the said schooner *Blanche C. Pendleton* was totally destroyed and wrecked, and her cargo lost by reason of which it has become impossible for the court, or its officer, to make delivery of the property in question.

By reason of which, on November 6th the petitioner notified the marshal in writing of the loss of the property and demanded the return of the amount of his bid deposited with him, namely, the sum of \$1,435.

It is conceded that the court can not now make delivery of the said vessel and cargo, nor give the petitioner possession thereof. Wherefore, the petitioner prays that he be refunded the said sum of \$1,435 now in the hands of the marshal of the court, and that the marshal be instructed by the court to deliver said sum unto the petitioner.

It is conceded that upon sale of property made upon final execution at common law no confirmation thereof is necessary, and that in case of loss occurring to the property in question after such sale has been made upon execution at common law the said loss must be borne by the purchaser thereof. However, it must likewise be conceded that in equity the sale is not complete before confirmation, and loss pending confirmation does not fall upon the bidder. As stated in Foster's Federal Practice, 4th Edition, Vol. 2, par. 316, "The sale does not take effect until it has been confirmed by the court." And in 24 Cyc., 33, the principle is stated as follows:

Confirmation is the formal expression of the judicial sanction of the sale, and is, therefore, necessary for its completion. Before confirmation the sale is not in technical and legal sense a sale. The accepted bidder is merely a preferred proposer, and to divest the former owner's title and render valid the sale to the purchaser the sale must be confirmed.

And in 24th Fed. Reporter, page 215, it is likewise stated as follows:

It is true, as was contended in argument, that in chancery a bidder at a sale by a master under a decree of a court, is not considered a purchaser until the report of sale is confirmed.

It is likewise clear that in equity sales, pending confirmation thereof, the risk of loss is upon the vendor (See 24th Cyc. 34, as follows:

The risk of loss pending confirmation is upon the vendor. If the property is accidentally destroyed before confirmation, the purchaser will not be compelled to complete, and also,

The bidder, not being considered the purchaser until the report is confirmed, is not liable to any loss by fire or otherwise, which may happen to the estate in the interim; nor is he, until the confirmation of the report, compelled to complete his purchase.

The correct view is also clearly and succinctly stated in *Meecham on Sales*, Vol. 1, par. 634 as follows:

The true view would seem to be that the loss follows the title.

Therefore, in the present case the petitioner contends that as the title had not been conveyed to him by means of a confirmation of the sale the loss should rest with the owner and not with the bidder.

But it was contended by the district attorney in the oral argument and in his brief filed herein that confirmation is not necessary in admiralty sales inasmuch as there is no express, positive rule of admiralty courts requiring formal confirmation. But in *Benedict's Admiralty*, a recognized work on Admiralty Practice, 4th Ed. Par. 500, it is stated, "The sale must be confirmed by the court before it becomes absolute." And in 1st Cyc. on Admiralty, 894, it is stated, "Sales must be confirmed by the court before the purchaser is entitled to the property." And the same principle has been decided in many well considered cases in the United States courts in the States. In the case of "*The Sue*," decided in 1905 by the District Court for the Eastern District of North Carolina, it was held:

Courts of Admiralty act upon enlarged principles of equity, rather than the strict rules of the common law. *O'Brien vs. Miller*, 168 U. S. 287. The bid of a purchaser at a judicial sale under the decree of the court is in legal effect only an offer to take the property at that price, and the acceptance or rejection of that offer is within the sound discretion of the court, to be exercised with due regard to the special circumstances of the case, and to the stability of judicial sales. *Milwaukee R. Co. vs. Soutter*, 5 Wall, 662; *Camden vs. Mayhew*, 129 U. S. 73. Until finally confirmed the decree rests in the breast of the Court. 137 Fed., 133, 134.

And in 163 Fed. Reporter 667, in the case of "*The Planter*," it is stated:

That the court has a judicial discretion in sales of the kind is undoubted, and it is generally governed by the rules which control the Courts of Equity.

In the case of the "*New Hampshire*," decided by Judge Brown, district judge of the Eastern District of Michigan, and afterwards justice of the United States Supreme Court, the rule was stated as follows:

Had this been an ordinary sale at auction, it is quite likely that the striking of her off to libellant and the subsequent receipt of the money by the auctioneer, would have vested a good title in the purchaser, although it is evident that in receiving the money, Mr. Blanchard (the deputy marshal) did not thereby intend to vest title or surrender possession to libellant.

A different rule, however, obtains in regard to judicial sales. The practise in Courts of Chancery and Admiralty requires that the sale be confirmed before the purchaser has a right to the property. Confirmation is said to be the judicial sanction of the court. Until then, the bargain is incomplete. When made, it relates back to the time of the sale, and supplies all defects except those founded in want of jurisdiction or in fraud. Until confirmed by the court the sale confers no right. Until then, it is a sale only in a popular and not in a judicial or legal sense. "The bidder" says the Supreme Court of Kentucky, "acquires by the mere acceptance of his bid no independent right, as in the case of a purchaser under an execution, to have his purchase completed," but is merely a preferred proposer, until the confirmation of the sale by the court, as agreed to by its ministerial agent. Ror. Jud. Sales, par. 122, 124-126, 134. Although it is true if the deed be made and delivery and possession surrendered, lapse of time may operate to confirm the title of the purchaser, without formal confirmation by the court; yet, ordinarily speaking, until confirmation, the sale may at any time be set aside, and a resale ordered. The vesting of title in a purchaser is obviously inconsistent with the power of ordering a resale. As the libellant expended his money and labor without authority, he is not entitled to recover and his libel must be dismissed. 18 Fed. Cas. 10, 160.

From the foregoing authorities it would seem to unquestionably follow that in an admiralty sale the sale is not complete before confirmation thereof by the court, and loss pending confirmation does not fall upon the bidder.

The district attorney in his oral argument and in his brief calls attention to the fact that the loss in this case will not eventually fall upon the Government of The Panama Canal, and that the real question is as to whether the loss must be borne by the owners of the schooner *Blanche C. Pendleton* or by the purchaser, Captain Nicholson. He calls attention to the fact that the schooner had been taken out of the possession of its owners under the order of the court, and that the owners, therefore, had no further control over it as it was in the possession of the marshal. But here it should be borne in mind that the agreement resulting in the interlocutory order of sale before the final decision upon the merits of the case was made by and between the attorneys for the Government of the Panama Canal and the owners of the vessel, and Captain Nicholson, the petitioner herein, was no party thereto. He merely appeared at the sale as a *bona fide* bidder for the property in question, and, therefore, if the question is whether he or the owner of the vessel should bear the loss it would seem to call for the application of the well-known equitable maxim that where one of two innocent parties must suffer, the loss must fall upon him whose act, however innocent, created the circumstances or condition which resulted in the loss.

Furthermore, it is equally true that from the date of the bid on October 4, 1917, to the date of the destruction of the vessel, November 5, 1917, the bidder at the sale, that is, Captain Nicholson, the petitioner herein, had not been given possession and had not acquired any rights to take over the property, or to protect it, or to take any

steps or precautions whatsoever to prevent the same from being destroyed by the storm. He could not have expended any money or labor upon it in an attempt to protect it or to save it from being destroyed by the storm except at his own risk and without any authority of the court, because it was within the power of the court at any time to reject the bid of \$1,435, made by the petitioner, and to accept any higher or better bid that might have been made prior to the actual confirmation. There would, therefore, seem to be equities upon the side of the owners of the schooner, and also upon the side of the purchaser at the sale, and the case would, therefore, seem to call for the application of the well-known equitable maxim that "where the equities are equal the law must prevail," and as well recognized practice requires a confirmation before the title changes, and as the title was in the possession of the owner of the schooner at the time of the destruction, it follows that the loss should fall upon the owner of the vessel rather than upon the bidder at the sale.

The motion of the petitioner herein is, therefore, granted and the marshal is instructed to deliver said fund unto said petitioner.

LOMBARD *versus* PANAMA GAS CO.

(District Court, Canal Zone, Balboa Division, December 27, 1917.)

Civil No. 197.

1. CONTRACTS. INDEPENDENT CONTRACTOR. PLEADING.

Where plaintiff brings an action on a writtten contract alleged to be the contract of the P. G. Co. and C. G. Co. and S. & R., which contract is signed by F. H. A., and where it does not appear from such written contract that F. H. A. is an independent contractor, a demurrer to the plaintiff's complaint will be overruled.

Attorneys for plaintiff, *Henckley and Ganson*.

Attorney for defendant, *C. P. Fairman*.

JACKSON, District Judge. The plaintiff seeks to recover from the defendants jointly and severally the sum of \$13,383.91 for work and labor performed, etc., arising under a contract of date the 27th day of January, 1917. A translation of the contract from Spanish to English is attached to and made a part of the complaint herein. The defendants interpose a demurrer to the said complaint for the reason as alleged that there is a defect or misjoinder of the parties defendant in that the proper party defendant and the real party in interest in said suit is one Florencio H. Arosemena, and that the parties defendant are not responsible nor in any manner bound by the terms of the contract upon which the cause of action is predicated.

A reading of the original contract in Spanish, filed herein, together with a translation thereof, attached to the petition, would seem to make the question very doubtful indeed as to whether in signing the contract in question the said Florencio Harmodio Arosemena acted as the agent and representative of the defendants herein or whether he was in fact an independent contractor of the said defendants, and that in making the contract with the plaintiff Lombard he acted in the capacity of such independent contractor, making the contract for and on his own behalf. The contract on its face is not sufficiently clear and free from doubt in this respect; so that the determination of this question, by reason of the uncertainty and ambiguity of the contract which appears upon its face, would seem to be one requiring evidence at the trial of the case.

Therefore, in as much as the complaint specifically alleges that the plaintiff and the defendants entered into the said contract, and in as much, for the purposes of this demurrer this allegation must be conceded, especially, as stated, a latent ambiguity appears upon the face of the contract, the demurrer must be overruled.

GOVERNMENT *versus* LAM.

(District Court, Canal Zone, Cristobal Division, January 12, 1918.)

Criminal No. 538.

1. CUSTOMS. SMUGGLING. CRIMINAL LIABILITY.

Under the treaty between the United States and the Republic of Panama, and under the Taft Agreement of 1904, the Executive Order of December 6, 1904, the Executive Order of August 8, 1914, the Governor's Circular No. 679 issued on November 21, 1914, and subsection (b) of section 301 of the Laws of the Canal Zone, any person smuggling goods into the Canal Zone destined for the Republic of Panama without the payment of the Panaman duty thereon, is criminally responsible for such act.

Attorney for plaintiff, *Walter F. Van Dame*.

Attorney for defendant, *William C. McIntyre*.

JACKSON, District Judge. The defendant was charged in an information filed against him by the district attorney that he "did knowingly and wilfully attempt to smuggle into the Canal Zone a quantity of jewelry consisting of rings, chains, watches, etc., of the value of \$50 United States currency more or less, which said jewelry was subject to duty by law." Upon the trial of the case at the conclusion of the evidence offered by the Government, which clearly tended to establish the alleged offense, counsel for the defendant moved to dismiss for the reasons that there are no custom duties in the

Canal Zone; that there is no collector of customs; that no collection of duties is made by the Canal Zone either for the benefit of the revenues of the Canal Zone or of Panama; that the Canal Zone is not financially interested in any duties which may be due unto Panama, and that Panama does not pay the Canal Zone for the prosecution of persons who may attempt to evade payment of duties to that country; that if any attempt was made to defraud the revenues it was only against the revenues of the Republic of Panama, with which this court has nothing to do.

In his brief filed herein counsel for defendant states, "Because this court and the former courts of the Canal Zone, on account of not having the law made clear and expounded, have been led astray in this regard and have mistakenly convicted of an offense over which they had no jurisdiction, is no reason why this court, understanding the law, should continue such a perversion of justice." Errors committed in former decisions should always be recognized and corrected, but at the same time a long and continuous recognition by the court of certain principles of law should not be lightly set aside unless clear, convincing and cogent reasons appear therefor.

Counsel in his brief also takes occasion to make the following statement: "I realize that this court is very friendly towards the Republic of Panama. This is very commendable, and would that the entire Government of The Panama Canal were so disposed." The object of this statement is not clear, since it must be known to counsel that the decision of this case must depend upon a strict construction of the treaty and the laws and executive orders in force.

Putting aside all considerations of friendship entertained by this court for the Republic of Panama and the good people thereof, and limiting ourselves, as we must, strictly to a consideration of the laws and treaties in force, we find that by Art. 13 of the treaty between the Republic of Panama and the United States that the United States was given the right to import free of customs duty, imposts, taxes, or other charges, all the articles and things therein specified and referred to, but it was stated in said article of the treaty as follows:

If any such articles are disposed of for use outside the Zone and on auxiliary lands granted to the United States and within the territory of the Republic they shall be subject to the same import or other duties as like articles imported under the laws of the Republic of Panama.

It will thus be seen that by the terms of this treaty the United States are to prevent the disposition outside of the Zone, and within the territory of the Republic, without the payment of the corresponding duties according to the laws of the Republic of Panama.

Under the Taft Agreement of 1904, we agreed that no importation of goods, wares, and merchandise should be entered at Ancon or Cristobal

except those specified in said article 13 of the treaty, and also except such as were in transit across the Isthmus for a destination without the limits, and except coal, crude mineral oil, fuel, etc. The Executive Order of December 6, 1904, modified the absolute prohibition of Sec. 1 of the Taft Agreement so as not to include within its scope goods accompanied by proper consular invoices, and this said Executive Order of December 6, 1904, specifically provides in section one thereof as follows:

But the goods, wares and merchandise not accompanied by consular invoice of the consul of the Republic shall not be permitted to land at Ancon or Cristobal.

It will thus be seen that we are under solemn, binding obligations both by way of Treaty Agreement and Executive Orders to the Republic of Panama in this respect; that is, to protect that Republic against the free entry of goods, wares, and merchandise into the Canal Zone which are destined for disposition within the Republic of Panama.

But further, the Executive Order of August 8, 1914, provides as follows:

Any person violating any of the customs laws or the customs rules and regulations established, or to be established by the Governor of The Panama Canal, in conformity with existing laws and orders, shall be subject to a fine not exceeding \$500 for each violation of such regulations.

And circular 679 dated November 21, 1914, Art. 13 thereof, with reference to such customs laws, rules, and regulations, provides as follows:

The Bureau of Customs shall have exclusive control over all goods, wares, and merchandise, including passengers' baggage, and packages of every kind and nature introduced into the Canal Zone, pending the release thereof on presentation of evidence in due form that such goods, wares, and merchandise are entitled to free entry, or that the import duties due to the Republic of Panama have been paid, or that payment has been waived. No such goods, wares, or merchandise shall be released for delivery to consignees or for reexport, except upon the order of a customs officer.

Counsel for the defendant further contends that this court has no right to decree in the criminal proceeding a forfeiture of the goods seized, but our invariable practice has been to the contrary. It is true that in the United States a separate proceeding is necessary against the goods attempted to be smuggled into the United States, but we must remember that the revenues laws of the United States do not of their own force apply in the Canal Zone. We must here be governed by the provisions of our laws in this respect, and Art. 301, Sec. B, p. 128, of the Laws of the Canal Zone, provides as follows:

Every person who enters goods, wares, or merchandise, whether free or dutiable, into the Canal Zone, Isthmus of Panama, for transportation across the Canal Zone, to be transshipped, or for other purposes, shall enter said goods, wares, or merchandise at the customs house of the collection district wherein the place of entrance is situated.

Any violation of this section shall subject the goods, wares, or merchandise to seizure and forfeiture by the collector of customs or his agents.

And, as heretofore stated, the courts of the Canal Zone have invariably, since the organization of said courts, construed this provision as giving the right to decree a forfeiture of the goods, attempted to be smuggled, in the criminal proceeding instituted against the offender.

I see no reason now to depart from the uniform decisions of all the judges of the Canal Zone in respect to the question herein presented. It follows that the motion of the defendant to dismiss must be and is hereby overruled.

LOMBARD *versus* PANAMA GAS CO., *et al.*

(District Court, Canal Zone, Balboa Division, January 18, 1918.)

Civil No. 197.

1. COURTS. JURISDICTION. NONRESIDENT PARTIES.

It appearing that the Panama Gas Company had property in the Canal Zone at the time of instituting this action, and that the said property was seized on a writ of attachment issued herein, and because thereof and because of the personal appearance of said defendant the court acquired jurisdiction as to said defendant.

2. COURTS. JURISDICTION. NONRESIDENT PARTIES.

The defendants, Colon Gas Company and Starr & Reed, although nonresidents, having appeared generally and filed demurrer to the plaintiff's complaint, thereby submitted themselves to the jurisdiction of the court and their plea to the jurisdiction is denied under authority of *Canavaggio vs. Habib*, 2 C. Z. Rep., 274.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorney for defendant, *C. P. Fairman*.

JACKSON, District Judge. On January 12th a plea to the jurisdiction was filed on behalf of each of the above-named defendants herein predicated upon the following provision of the Executive Order of the President of July 28, 1910:

SECTION 1. No civil action or special proceeding shall be brought or proceeded with in courts of the Canal Zone, in any case in which both of the parties, plaintiff and defendant, are alien nonresidents of the Canal Zone, and the cause of action is one which arose without the territorial limits of the Canal Zone Government, and the party proceeded against has no property within said territorial limits, subject to the jurisdiction of the Canal Zone courts.

So far as the Panama Gas Company is concerned it must be said that the court has jurisdiction, irrespective of any question of waiver, by virtue of the provisions of this Executive Order, because the said Panama Gas Company had certain property, consisting of pipes, etc., within the Canal Zone, which were attached by the plaintiff. This, we have invariably held, satisfied the provisions of said Executive Order with reference to jurisdiction of the persons. As to the two other defendants, the Colon Gas Company, and Starr & Reed, it would seem that the objections were well taken were it not for the fact that on

December 14, 1917, a demurrer to the complaint was filed by all of the defendants herein, which said demurrer was argued and overruled, and thereafter, on January 3, 1918, a motion to make more definite and certain was filed by all of said defendants. The filing of the demurrer and the motion to make more definite and certain must be held to constitute a voluntary personal appearance, and a waiver of the jurisdictional question which might otherwise have been taken advantage of pursuant to said Executive Order; that is, so far as the Colon Gas Company and Starr & Reed are concerned. This principle was decided by the Supreme Court of the Canal Zone, all of the judges concurring, in the case of *Canavaggio vs. Habib*, wherein the court stated as follows:

But, furthermore, it can not be doubted that the Canal Zone court had jurisdiction of the subject matter of the action, that is it had jurisdiction of the general class of cases to which this particular case belongs. The jurisdictional question presented was therefore as to the person of the defendant and not as to the subject matter, and it has been repeatedly held that while the question of jurisdiction of the subject matter is never waived by appearance and that the same can be raised at any time, even for the first time in the highest court of review, nevertheless the question of jurisdiction of the person of the defendant can be and is raised by appearance, notwithstanding an exception may be reserved to the action of the court in failing to dismiss for want of personal jurisdiction.

It must here be stated that the jurisdiction of this court is being sought with increasing frequency in cases which should more properly be tried in the courts of the Republic of Panama, where the parties reside and where the cause of action arose. However, in view of the former decisions of the Supreme Court of the Canal Zone, and of this court, and also in view of the fact that if the contention of attorney for the defendants is sound, that is; that the question here presented goes to the jurisdiction of the subject matter rather than to the person, the question involved in this case may be presented to the Circuit Court of Appeals; this court must adhere to these former decisions until the said United States Circuit Court of Appeals may have otherwise construed the said Executive Order under consideration.

The plea to the jurisdiction is, therefore, overruled.

CRISTOBAL-COLON STEVEDORING COMPANY
versus THE S. S. "RANCAGUA."

(District Court, Canal Zone, Cristobal Division, February 12, 1918.)

Civil No. 178.

1. ADMIRALTY. JURISDICTION. PUBLIC VESSELS.

Where it appeared that the *Rancagua* was a transport used in connection with the Chilean Navy but was chartered for two trips for the purpose of carrying

nitrate from Chile to Colon, such vessel is not subject to seizure under admiralty process either in a tort or contract case, and that the court has no jurisdiction. (Affirmed 256 Fed. 843.)

Proctor for Cristobal-Colon Stevedoring Company, *C. P. Fairman*.
Proctors for S. S. *Rancagua*, *Hinckley* and *Ganson*.

JACKSON, District Judge. The libel herein alleges in substance that the vessel *Rancagua* is a Chilean vessel and is chartered by the firm or corporation of William Gibbs & Co., of New York City, for the purposes of conveying a cargo consisting of 8,000 tons of nitrate, more or less, to the port of Cristobal, and that C. A. Hernandez is the master of said vessel; and on the 25th day of July, 1917, the said master, C. A. Hernandez, in his own behalf and as the agent of the charterers above-named, entered into a contract with the Cristobal Stevedoring Company, for the discharge of the cargo of 8,000 tons of nitrate; that pursuant to the terms of said contract the said stevedoring company on July 26, 1917, assembled their employees and equipment on the vessel and dock at Cristobal for the purpose of effecting the discharge of the cargo, but that they were prevented from so doing, and were informed that other arrangements had been made for the discharge of the cargo and that the services of the libellant were no longer needed. By reason thereof, the stevedoring company was caused a loss and put to an expense in the sum of \$243.78, and suffered damages on account of loss of business and prestige, in the sum of \$1,000. Wherefore, it is prayed that the Court pronounce in favor of the libellant for the sum of \$1,243.78.

Claims and exceptions to the jurisdiction of the court were filed herein by the said Carlos A. Hernandez as master of the said vessel, wherein it is asserted that the court has no jurisdiction of the matters contained in the said libel and no jurisdiction over the said Chilean transport *Rancagua*, or over the master or crew of said vessel. In support of the exceptions to the jurisdiction the affidavits of the said Hernandez, master of the vessel, and also of John Ehrman, Chilean Consul are filed from which it appears that the said vessel, including its rigging, apparel, equipment, etc., belongs to the Chilean Government, and as such, is mentioned on its admiralty list; that said vessel is commanded by officers and a crew of a friendly nation of the United States, and that said Government has never consented, and does not now consent to submit its national vessel, nor master, to the jurisdiction of this court, but insists upon its independent character and consequent immunity from a suit of this nature.

The libellant files an answer to the claim and exception of the master of the S. S. *Rancagua* to the jurisdiction of the court, wherein it is

asserted that this court had jurisdiction of the vessel and cargo at the time of the institution of this suit, for the reason that at said time, the said vessel, its master and crew, were engaged in and operating as a common carrier for hire, and the said vessel was at the said time demised and leased unto the firm of Gibbs & Company of Valparaiso, Chile, in the transportation of a cargo of nitrates from a port in Chile to the port of Cristobal, Canal Zone; also, that at the time the contract was entered into between the libellant and the master of the S. S. *Rancagua* for the discharge of the cargo of the vessel, the said master was acting in the capacity of agent and representative of the owners of the cargo of nitrate with which the vessel was loaded.

It must be conceded as a well-established principle of law, based upon international comity, that a vessel of a friendly government is not, generally speaking, subject to seizure and attachment in admiralty proceedings in the courts of a friendly foreign jurisdiction. The identical proposition was decided by the United States District Court of the Eastern District of New York on August 29, 1917, in the case of the *Pampa* as follows:

A vessel regularly enrolled as a ship of the Argentine Navy, and flying the naval ensign of that republic, whose officers and crew were officers and enlisted men of such navy, was not subject to a libel for damages for a collision, though at the time of the collision carrying a cargo of general merchandise belonging to private persons, especially where the cargo was carried for the benefit of the government, and as an incident to the vessel's voyage to this country to obtain coal and munitions for the use of that government.

In deciding the case the Court said, quoting from the case of *Attualita*, 238, Fed. Rep., 909:

For actions of the public armed ships of a sovereign and of those, whether armed or not, which are in the actual possession, custody and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other courts.

The Court in the case of the *Pampa*, further said:

Moreover, it appears that, although this vessel was carrying a general cargo, the cargo was carried for the benefit of the Argentine Republic, and as an incident to her voyage to this country to obtain coal and munitions for the use of the Argentine Republic.

Decree will issue releasing the vessel from arrest.

The libellant in conceding this general proposition of law, contends that it is not applicable to the instant case because of the charter party referred to. It appears that under date of June 15, 1917, the Government of the Republic of Chile, by its duly authorized representative, entered into a charter party with the firm of Gibbs & Company of Valparaiso, by the terms of which the transport *Rancagua* was leased to the said firm for two voyages to Colon via the Panama Canal to carry a cargo of nitrates of not less than 8,000 tons on each voyage,

in consideration whereof the charterers were to pay the sum of \$14 per long ton of 2,240 pounds, or a minimum consideration for each voyage of \$112,000. It is the contention, therefore, of the libellant that for the time being this vessel pertained to Gibbs & Company rather than to the Government of Chile, and that it was accordingly subject to seizure in admiralty proceedings to satisfy the contract obligations of the said Gibbs & Company. But it can not be overlooked that the vessel itself belonged to the Republic of Chile, and that it was chartered for two voyages only, and that it was officered by officers of the Chilean Navy, and manned exclusively by a crew composed of enlisted men in that navy. Also, that the vessel was a Government transport engaged in shipping nitrate destined to the United States for the purposes of the war.

I have carefully read and examined the charter party referred to, and the arguments of counsel for the libellant with reference thereto, and after a very careful consideration of the same I can not see that the existence of the charter party alters in any respect the basic principle of the important question here involved, which is, that the vessel itself, although chartered to Gibbs & Company for two voyages, was, nevertheless, a vessel of the Chilean Republic; that although leased for two voyages, the Chilean Government retained title and ownership thereto; that the contract for discharging the cargo was made by the master, representing Gibbs & Company, and that, therefore, the libel herein is in substance and effect an attempt to seize a vessel of a friendly foreign government and subject it to the payment of an alleged contract obligation due from Gibbs & Company, the charterers thereof. It can not be said that the Government of Chile by reason of this charter party, or otherwise, ever consented that its vessel should be seized in admiralty proceedings.

Counsel for the libellant, however, contends that the instant case differs from the case of the *Pampa* heretofore cited, because the present case sounds in contract whereas the case of the *Pampa* sounded in tort. But it must be remembered that the contract for the discharge of the cargo was made by Gibbs & Company and not by the Chilean Government. Furthermore, a consideration of the reported cases would lead to the conclusion that the privilege against seizure of foreign vessels in such cases would apply alike in cases of contract as well as in tort. In *Benedict on Admiralty*, 3d Edition, Sec. 379, the principle is stated as follows:

The mariners of the public vessels of the nation can not proceed against them in admiralty, for the reason that the government or sovereign can not be sued. It is not because the court has not jurisdiction, but because there is not right of action against the government or its property. In like manner, the mariners of a public vessel of a foreign power within our jurisdiction are not allowed to proceed against the vessel or

officers. This is not because they are simply foreigners, but, because, by the common law and universal consent of nations, the person, the ministers, and the vessels of a sovereign retain their independent character, and their consequent immunity, wherever they rightfully are, in times of peace.

And in the *Schooner Exchange*, 3 Law Ed., U. S., 287, it is stated by Chief Justice Marshall as follows:

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

And in the case of the schooner *Liberty*, 12 Louisiana, 98, as follows:

It appears to be a settled principle of international law, as taught by elementary writers and recognized by the highest judicial authority of the Union, that a public armed vessel of a foreign state at peace with the United States, while enjoying in friendly manner the hospitality of our waters, is exempt from the jurisdiction of the local tribunals.

Also in the case of the *Tampico*, 16 Fed. Rep., 491, the Court said:

By international comity, and that tacit agreement which constitutes the law of nations, every government accords to every other friendly power the same respect to its dignity and sovereignty, and the same consequent immunity from suit; both as respects the person of the sovereign as well as the national property devoted to the public service, which it enjoys itself within its own dominions. As a government can not be impleaded in its own courts, without its consent, so no personal suit can be maintained against a foreign sovereign; nor, as incidental to such suit, can any attachment be levied in the courts of common law, or any garnishee process be maintained against the property of a foreign government.

The principles enunciated in the above entitled cases seem sufficiently broad to comprise exception from seizure in cases sounding in contract as well as those in tort.

The Court does not here pass upon any question affecting the liability of Gibbs & Company or the right to seize and hold any of their property that may be found within this jurisdiction, but for the reasons stated it follows that the exceptions to the libel filed on behalf of the steamship *Rancagua* must be and are hereby sustained, and that the bond of \$1,500 heretofore deposited by the Chilean Government should be released and returned.

GILL, *et al.*, versus WATSON, *et al.*

(District Court, Canal Zone, Balboa Division, March 2, 1918.)

Civil No. 196.

1. LIBEL AND SLANDER. RETRACTION. DAMAGES.

Where, in a case of slander, the defendant apologizes to the plaintiff for the slanderous matter and embodies such apology in the answer, such apology will be taken into consideration by the court in reduction of damages.

Attorney for plaintiff, *E. M. Robinson*.

Attorneys for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. CONSIDERING that the plaintiffs in their answer filed herein particularly deny that either of them ever made the slanderous statements which they are charged with having made in the complaint; and

CONSIDERING that it is undoubtedly true, as appears from the evidence, that the defendant, David Watson, the husband of Mrs. David Watson, never at any time made or countenanced the making of any such statements, and that it is after all the said David Watson who must be called upon to satisfy any judgment rendered herein; and

CONSIDERING that Mrs. David Watson states in her answer that if she did at any time make any statements derogatory to the plaintiffs or either of them she hereby tenders a sincere apology therefor, and she further states that she has heretofore apologized to the above-mentioned Mrs. Gill in person; and

CONSIDERING that, although it would appear from the evidence that Mrs. David Watson did make certain statements that might technically be considered as forming the basis of an action for slander, that, nevertheless, no material or social damage has resulted therefrom to the plaintiffs, and also that it would appear from the evidence, and from the proneness of human nature to misinterpret and to magnify in matters of this character, that in all probability the statements attributed to Mrs. Watson have been somewhat misconstrued and magnified; and especially

CONSIDERING the apology herein publicly tendered, the court finds for the plaintiffs and awards a verdict in the sum of twenty-five (\$25) dollars, without costs.

OBARRIO, *et al.*, versus ARIAS.

(District Court, Canal Zone, Balboa Division, April 15, 1918.)

Civil No. 122.

1. PRESCRIPTION. DELIMITATION OF BOUNDARIES.

Where a fence has existed on a line claimed to be a boundary line, and where the owners of adjacent tracts have dealt therewith as the boundary, and where the defendant has had open, notorious, hostile and adverse possession of the tract in dispute for thirty years, his title will be adjudged good by prescription.

[NOTE]. See decision on demurrer, November 1, 1916, 3 C. Z. Reports p. 115.

Attorneys for plaintiff, *Fabrega and Arias*.

Attorney for defendant, *Oscar Teran*.

JACKSON, District Judge. The plaintiffs in their petition filed herein claim that they are now and for a long time have been the absolute owners of and entitled to the possession of that certain tract or parcel of land situated in the City of Ancon, Canal Zone, and described as follows:

It bounds on one side with the property known as El Rey, and on the other with that of Mr. Domingo Lopez; its depth is from the road that leads to the well of El Chorillo, (now Balboa road), as far as Punta Mala beach, and the boundaries are well known by the old stump fences, it being understood that on the higher portion (on the west) there is a hill, one-half of which belongs to the property herein sold, and the remaining portion belongs to that which has passed to the estate of Manuel Maria Cajar.

The piece of property here described, which consists of some 5,379 square meters, and which forms the basis of this action, the plaintiffs claim by virtue of a deed executed by the Seminary of Panama in favor of Mr. William Nelson on the 14th of October, 1854. It is alleged that the heirs of the said William Nelson on the 2d of September, 1882, by deed No. 125, conveyed the property herein described, together with other property forming a portion of what is known as the estate of Los Positos or La Eureka, to Don Nicanor de Obarrio, who, by deed No. 213 of August 27, 1883, conveyed the same to Obarrio & Company, and that Alberto B. de Obarrio, one of the plaintiffs herein, purchased at a judicial sale all of the property known as Los Positos, including the property in litigation herein, and that the said Alberto D. de Obarrio conveyed one undivided half interest in the said property to Domingo Diaz by deed No. 723 on October 28, 1908, and that Domingo Diaz is now deceased but that Elisa A. de Diaz, Isabel Diaz de Jimenez and Domingo Diaz A. are his legal representatives. The plaintiffs allege that the defendant claims an interest in and to that portion of the real estate herein described adverse to the plaintiffs and that the said claim of defendant is without any legal right whatever in said land or premises, and that the defendant is out of possession and that the plaintiffs are in the actual possession thereof. Wherefore, plaintiffs pray that by decree of this court it be declared and adjudged that the plaintiffs are the owners of said premises and are entitled to the possession thereof, and that the defendant has no estate or interest whatever in or to said land and premises, and that defendant be forever barred from asserting any claim whatever in and to said land and premises adverse to the plaintiffs.

The defendant in her answer filed herein claims that she is the owner of that certain estate adjoining that of Los Positos known as Punta Mala, and that the said estate of Punta Mala was bought at public auction by Dr. Carlos Icaza on the 16th of October, 1862; that Dr. Carlos Icaza sold the estate to Mrs. Elisa Bonilla de Icaza by public deed No. 255 on December 26, 1862; that Mrs. Elisa Bonilla Icaza died seized and possessed of said property which reverted to her husband, Dr. Carlos Icaza Arosemena, who died in 1896, leaving said estate to his son, Eduardo Icaza, who, in 1907, left the same to Dolores Icaza de Arias, the present owner, married to Pedro Arias, deceased.

The boundaries of the estate of Punta Mala contained in defendant's deed No. 255 of December 26, 1862, are as follows:

On the front part the beach, on the back the orchard of Juan José Cajar, on the right hand side the orchard of Juan Pablo Pacheco, and on the left hand side the orchard of Dr. Jose Francisco de la Ossa, from which it is separated by an estero.

Defendant alleges that the above description as contained in the said deed of December 26, 1862, embraces the property herein in controversy, and that as far as the memory of living man can remember it has always been known and definitely separated from the surrounding neighboring estates by old fences of trees and wires, and that the defendant through her predecessors in interest and afterward, through her husband, Pedro Arias, deceased, has been and remains seized and possessed of the entire premises as shown by said old fences referred to for more than 40 years; and that for 15 years last past defendant's husband and defendant herself have worked a stone quarry belonging to the estate, and have leased it to other parties; that the possession of the defendant over the entire Punta Mala estate, including the part in controversy, has been open, quiet and uninterrupted for more than 40 years. Wherefore, the defendant prays for a decree of this court declaring and adjudging that the defendant is in possession of the 5,379 square meters in dispute as forming an integral part of the entire estate of Punta Mala, of which it is alleged the defendant is the owner in fee.

The determination of the question here presented depends principally upon:

First. The location of the estero referred to in the said deed of December 26, 1862, which deed forms the basis of the defendant's title; and

Second. Whether or not a certain old wire fence which comes from the summit of Ancon Hill and runs down in a curved line up to a point on the estero that crosses the lands of Los Positos, and which said fence, instead of following a direct line, follows an indefinite and capricious line, does or does not represent the boundary between the two estates; that is, the estates of Los Positos and Punta Mala; and

Third. Whether or not the triangular piece of property consisting of this 5,379 square meters in the Canal Zone, which is the property herein in controversy, and which lies between the fence as constructed and what would be a direct extension thereof, has or has not been in the open, adverse and continuous possession of the defendant for 30 years or more, the time prescribed by the Statute of Limitations.

It seems that for the first time the plaintiffs made formal claim to the property in question in 1914 when the matter of the adjustment in the Canal Zone of the lands was pending before the Joint Commission, and thereupon Pedro Arias, now deceased, instituted proceedings in

the courts of the Republic of Panama to establish his ownership, and that two experts appointed by the Panamanian courts, namely Zeifiro Zappi, and F. H. Arosemena, rendered a report to the Third Circuit Court, in which they sustained the contention of the plaintiffs herein with reference to the questions of the estero and the fence herein referred to. A translation of the copy of said report is as follows:

To The Third Circuit Court:

The undersigned, the experts appointed, after examining with due care the maps and documents relating to the various estates located between La Boca Road, the orchard known as "El Rey," the beach, and the properties that belonged to Doctor Jose F. de la Ossa, and after having gone over the ground, state as follows:

1. That the estero spoken of in several of the title deeds submitted to us in the one that forms the boundary line between the estate of "Punta Mala," belonging to the wife of Mr. Pedro Arias, and the estate of "San Lazaro" that belongs to-day to Mr. Gabriel Duque; and therefore there is no reason for thinking that the estero found on the east of the estate of "Punta Mala," within the lands of "Los Positos," is the one mentioned as the boundary line between the property of "Punta Mala" and "Los Positos."

2. That in fact there exists on the boundary of "the left," that is to say on the west of the estate of "Punta Mala," a small estero of which we have found indications under the aspect of a strong depression of the ground on said place, by which there entered and now enter the waters in high tide.

3. The fence that comes from the summit of Ancon Hill and comes down in a curb up to a point on the estero that crosses the lands of "Los Positos," follows an indefinite and capricious line that does not represent a natural and well determined boundary, which fence in no wise could be "the old stumps of the old fence" spoken of in the most ancient title deeds of "Los Positos."

4. From the different investigations made it follows that Doctor de la Ossa never had lands on the east of "Punta Mala," and that there existed a small estero on the limit or boundary between "Punta Mala" and "San Lazaro," that is the lands that belonged to Doctor de la Ossa.

By virtue of all the indications resulting from the different title deeds and from our private observations, we are of the opinion that the boundary line between the property of "Punta Mala" and "Los Positos" is the continuation of the line that divides the waters from the top of Ancon Hill as far as the top of Punta Mala Hill, which constitutes a natural, logic and acceptable boundary.

We hereby draw the Court's attention on this point and accordingly recommend that it be fixed as a definite boundary the dividing line above mentioned.

The experts,

(Signed) ZEFIRO ZAPPI,
F. H. AROSEMENA.

The said Commission, however, did not, and I presume it was not empowered, to pass upon the question of title by prescription, and, furthermore, in passing upon the all-important question of the exact location of the estero herein referred to, and also as to whether or not the fence in question did or did not constitute the boundary line between the two estates of Punta Mala and Los Positos, it must of necessity have acted solely upon the evidence presented to it, whereas this court has had to consider a mass of evidence and testimony covering several

days of the trial of the case and 127 pages of typewritten matter. The report of the Commission is interesting and instructive but the opinion of the court must be predicated upon the evidence adduced at the trial hereof. We will, therefore, briefly consider these three questions in their regular order.

First. As to the exact location of the estero which is referred to in the deed of December 26, 1862, as forming the eastern boundary of the estate of Punta Mala. A difficult question has been the exact definition of what constitutes an estero and what would correspond to such definition in the vicinity of the properties referred to in the various deeds, etc. The best definition of estero I have been able to find in Spanish is as follows:

Estero—Cano o brazo que sale de un rio, y que participa de la crecientes y menguantes del mar, con la cual es a veces navegable.

El estrecho de tierra a que se extienden las mareas, que entran en un rio o en un recodo de la costa del mar.

A translation of which into English is as follows:

An arm or branch which flows from a river, and which partakes of the flood and ebb tide of the sea, by which it is at times navigable.

The narrow strip of land to which the tides extend, which enter in a river or in a bend of the sea coast.

Looking at all the maps offered in evidence, and having considered very carefully the topographical situation, I have reached the conclusion that the estero referred to as forming this dividing line is that claimed by the defendant, not only because this is the only inlet from the sea that would properly correspond to the definition above referred to, but because it is the only logical conclusion to be arrived at. The estero referred to to the west thereof, shown on the maps filed herein, and which is claimed by the plaintiffs as being the estero which must mark the delineation of the properties, can not now properly be considered as such because the evidence clearly shows that it is not at the present time an estero within the proper definition of the word, nor is there sufficient evidence before this court to show that it could ever properly have been considered as such. The report of the commissioners themselves, Messrs. Zappi and Arosemena, particularly refutes the idea that it was ever such an estero as would probably be referred to by the parties as constituting a boundary line between the estates. The report in this respect is as follows:

On the front part the beach; on the back the orchard of Juan Jose Cajar; on the right hand side the orchard of Dr. Pablo Pacheco; and on the left hand side the orchard of Dr. Jose Francisco de la Ossa, from which it is separated by an estero.

In such event the estero might be the one to the left as claimed by the plaintiffs, but it seems far more reasonable to read it the other way; that is, facing the beach. By so doing this would place the orchard of Dr. Jose Francisco de la Ossa on the right hand side, and the necessary result would be that the estero is that claimed by the defendant.

Second. The plaintiffs claim that the fence shown upon the map does not constitute the dividing line between the estates, but that it was a fence constructed within the limits of the estate of Los Positos itself, and for the purpose of preventing the escape of cattle along the estero. The experts in their report state as follows:

The fence that comes from the summit of Ancon Hill and comes down in a curb up to a point on the estero that crosses the lands of Los Positos, follows an indefinite and capricious line that does not represent a natural and well determined boundary, which fence in no wise could be the old stumps of the old fences spoken of in the most ancient title deeds of Los Positos.

But to my mind the fact itself that the fence did follow a capricious line instead of a straight line direct to the point of Punta Mala would indicate that it was for the purpose of delineation between the two estates. I am not satisfied from the evidence that this was done as stated by the witness Miguel Caceres for the purpose of preventing cattle escaping along the estero because it is clear from the evidence that the estero itself might have been fenced or guarded in some way so as to prevent the escape of cattle along the same during low tide, and the fence in question could well have been extended direct to Punta Mala, taking in all the property claimed by the plaintiffs. The fact that it was not so done, and that the fence, according to the testimony of the plaintiffs, was constructed by one Miguel Caceres in the year 1882 in such way and in such manner and in such proximity to the property of defendant as that it might reasonably be considered as a dividing property line, constitutes to my mind one of the strongest arguments against the claim of the plaintiffs. It is true that this witness Miguel Caceres stated that it was a temporary fence for the purpose stated, and that the owner, Nicanor A. de Obarrio, and he himself, always considered that the triangular piece of land lying between the summit of the hill and the fence herein mentioned formed part of the estate of Los Positos, but there was a great mass of testimony to the contrary, which would indicate that the fence in question was constructed as a dividing line between the properties in question, and that it was so considered and treated by all parties interested at that time and continuously since up to the year 1914. In fact it may be said to have always had the character and reputation of such dividing line. The evidence of Mr. Eduardo Icaza, the uncle of the defendant, in this respect is very clear and illuminating. As stated by plaintiffs' counsel in his brief, "Mr. Eduardo Icaza gave very interesting testimony as a witness for the defendant. His testimony may be called authoritative, both by reason of the high and honorable position that he holds in the community, and also because of his actual knowledge of the place with which he was connected." The testimony of Mr. Icaza refutes entirely the

claim that this fence was a provisional one constructed within the limits of Los Positos, but that the boundary line that separated the estate of Punta Mala was and has always been considered the estero as claimed by the defendant. This court is compelled to give to the testimony of Mr. Eduardo Icaza the authoritative value which is conceded by counsel for the plaintiffs.

Again, looking at the matter from the standpoint of common knowledge and reputation, I am compelled to give much weight to the maps drafted by instructions of the French Canal Company many years ago, from which it would clearly appear that the dividing line between the estates of Los Positos and Punta Mala was in fact the fence claimed to have been built by Miguel Caceres from the top of the hill towards the estero; also the oral testimony of Mr. Raggi, an engineer of the French company to this same effect; and also the fact that as late as 1917, Mr. Alberto B. de Obarrio subscribed a map made for the purpose of the opening by the Canal Government of a new road in that vicinity, on which the property in dispute was marked "Arias tract." Of course, this could not amount to a conveyance or transfer of any property owned by Mr. Obarrio, but it is a strong circumstance for consideration of the court.

Another claim of the plaintiffs which I have carefully considered is that, according to the plaintiffs' original title deed of 1854, the estate of Los Positos is shown as extending as far as the beach of Punta Mala. Council for the plaintiffs locates this beach at the point called Punta Mala, and construes the deed as if this narrow point stood for the entire southern boundary of the estate of Los Positos; that is, that the estate Los Positos must be considered as embraced within the line drawn from the top of the hill direct to Punta Mala itself. But as a matter of fact the evidence in this case as shown by the testimony of Mr. Eduardo Icaza, Mr. George Arias, and many others, shows that the beach of Punta Mala so-called in that vicinity, has an extension of several hundred yards. Plaintiffs would limit the boundary as at the point of Punta Mala, whereas the deed of 1854 itself says, "as far as the beach of Punta Mala." In other words, the deed does not specifically call for the point of Punta Mala, but it may well be some other point farther to the east thereof, and this seems to be the reasonable construction and interpretation of the instrument.

Third. But aside from the two foregoing considerations herein, the decided preponderance of the evidence tends to show that the defendant and those from whom she claims title, have been in actual, open and adverse possession of the property in question for more than 30 years. Plaintiffs' counsel in his able brief filed herein states as follows:

The plaintiffs do not deny that the defendant has been in possession of the estate Punta Mala. They do deny, however, that the estate of Punta Mala extends to the

place claimed by the defendant, and they deny further that the triangular piece of land in dispute has ever been in possession of the defendant.

But the evidence of Mr. Eduardo Icaza, Mr. George Arias, and numerous other parties, who have from time to time leased the property known as Punta Mala from the owners thereof, would indicate that this triangular piece of property in question had actually been in the use, cultivation and possession of the Icaza family for more than 30 years. If we take the statement of Miguel Caceres as absolutely correct; that he built the fence in question in 1882 as a fence within the limits of Los Positos at that time to prevent cattle escaping, nevertheless, from 1882 to 1914, when the first adverse claim was made, there lapsed a period of 32 years, during which, according to the decided preponderance of the evidence, the Icaza family was in open, notorious possession, either individually or through lessees. And such possession was sufficient to constitute title by prescription. As a matter of fact the evidence shows clearly that a part of the property in dispute between the parties hereto was a quarry or cantera, and that this quarry was actually worked for some 15 years under lease from the Icaza family, and that from time to time rock therefrom was sold to Mr. Obarrio. It may be, as claimed by counsel for plaintiffs, that this quarry is within the Republic of Panama, but, nevertheless, it falls within the terms of the controversy between the parties hereto, and therefore, such facts can not be overlooked, but must have an important bearing in the conclusion reached.

It follows from the foregoing that the petition of the plaintiffs herein; that they be declared and adjudged the owners of said premises and entitled to the possession thereof, must be dismissed, and that the defendant is entitled to a decree as prayed, declaring and adjudging that the defendant is in possession of 5,379 square meters, 79 square centimeters in dispute as forming an integral part of the entire estate of Punta Mala, and that she is the owner in fee thereof, and that the plaintiffs have no estate or interest therein. A decree may be prepared accordingly.

DIXON, Guardian, *versus* SMITH, Auditor.

(District Court, Canal Zone, Balboa Division, May 22, 1918.)

Civil No. 213.

1. TREATIES. JOINT COMMISSION. AWARD. MANDAMUS.

Where the Joint Commission has made an award in favor of a party for the expropriation of lands, and money has been appropriated for the purpose of making payment therefor, and such money is in the hands of the auditor for the purpose only of making such payment, and demand for payment has been made and refused, mandamus will be issued to compel payment.

2. GUARDIAN. INSANE PERSON. JURISDICTION. ACTIONS.

Where property of a nonresident insane person is present in the Canal Zone, the courts of the Canal Zone have jurisdiction to appoint a guardian of the property and such guardian may maintain an appropriate suit for its recovery.

Attorneys for plaintiff, *Hinckley and Ganson*.

Attorneys for defendant, *Walter F. Van Dame and Chas. R. Williams*.

JACKSON, District Judge. At the trial of the above-entitled case the following salient facts appeared by admission of counsel for respondents in open court:

That the relator was appointed by this court as guardian of the estate of Francisco Ayala, mentally deficient, within the Canal Zone:

That the umpire of the Joint Commission rendered an award in favor of the heirs of the estate of Teresa Valdes de Ayala for the sum of \$34,100, with interest thereon from the 5th day of December, 1912, at the rate of 6 per cent per annum;

That Francisco Ayala, the insane person, for whose property within the Canal Zone the relator was appointed guardian, was entitled to one-sixth of the amount of this award with interest;

That Congress had appropriated money to pay for awards of this nature, and the money therefor was available;

That five-sixths of the amount of the award had already been paid by a warrant or voucher issued by the respondent, H. A. A. Smith as Auditor of The Panama Canal, but that said auditor had refused to issue a warrant or voucher for the payment of the one-sixth of said award to the insane person above-named;

That the amount due to the said insane person as the result of the award of the umpire of the Joint Commission was the sum of \$5,683.333 with interest thereon from the 5th day of December, 1912, at the rate of 6 per cent per annum until paid, or until tender of payment was made;

That demand was made by the relator as guardian aforesaid upon the respondent H. A. A. Smith, Auditor of The Panama Canal, for the issuance to him as guardian of the said insane person of the voucher or warrant for the payment of the said sum of \$5,683.333, with interest thereon at the rate of 6 per cent per annum until paid;

That the respondent has refused and still refuses to issue said warrant or voucher therefor.

As further bearing upon the questions herein involved it is proper to state that under date of December 5, 1912, the President of the United States by Executive Order provided for the expropriation by the United States of all the privately owned lands in the Canal Zone.

In February, 1913, a Joint Commission assembled in the City of

Panama for the purpose of hearing and passing upon the claims of the owners of private lands and private properties situated within the Canal Zone which were to be taken by virtue of the Presidential order. Among the claims filed was one in behalf of the heirs of Teresa Valdes de Ayala for the lands known as San Lazaro, consisting of approximately 15 hectares, situated within the Balboa Division of the Canal Zone. It appears that there was no dispute as to the title of the said Francisco Ayala in and to an undivided one-sixth interest in and to the lands of San Lazaro.

On October 13, 1917, the umpire of the Joint Commission rendered an award in favor of the heirs of Teresa Valdes de Ayala for the said lands of San Lazaro in the sum of \$34,100 United States currency, with interest thereon from the 5th day of December, 1912, at the rate of 6 per cent per annum until the day "upon which full payment or tender of payment was made." This award specifically mentions that a portion of the amount assessed as the value of the lands was to be paid to the guardian of Francisco Ayala, mentally deficient. Prior to the date of the rendition of said award the relator, Robert P. Dixon, who had been appointed by this court guardian of the property of the insane person, Francisco Ayala, within the Canal Zone, had appeared before the Joint Commission in this capacity, praying that the portion of the award that was made by the Joint Commission, or its umpire, in favor of his ward, should be paid to him. It would, therefore, seem that both the Joint Commission and the umpire were cognizant of the fact that the relator had been appointed by this court guardian of the property of the said insane person, and that the umpire in rendering an award in favor of the guardian of said insane person intended that the amount thereof should be paid to the relator.

The reason assigned by the auditor for refusing to pay to the relator the amount due the insane person is that, in his opinion, this court was without jurisdiction to appoint a guardian of the property of said insane person. The auditor's opinion in this respect, as stated in his evidence at the trial hereof, was predicated upon his statement that the award constituted merely a personal claim against the Government of the United States, and that in view of the fact that the insane person resided in the Republic of Panama, and not in the Canal Zone, this court was not vested with authority to appoint a guardian.

Section 608 of the Code of Civil Procedure of the Canal Zone expressly provides for the appointment of a guardian of the estate, within the Canal Zone, of a minor or insane person residing out of the Canal Zone. The provisions of the Code of Civil Procedure in this respect were strictly complied with in the matter of the appointment of the relator.

An adult sister of the insane person filed a petition, praying for the appointment of the relator as guardian, and upon a hearing had in conformity with the statute, and after due notice to all interested parties, the relator was duly appointed by this court as guardian, taking oath as such, and giving bond in the sum of \$10,000 and thereupon letters of guardianship were duly and properly issued to him. The evidence in the case shows that certified copies of all of these proceedings, including the letters of guardianship to the relator, were delivered to the respondent by the relator at the time he demanded payment to him of the one-sixth of the award of the umpire of the Joint Commission.

From the foregoing it would seem clear that the issuance of the warrant or voucher demanded by the relator was a purely ministerial act which it was the duty of the respondent as Auditor of the Panama Canal to perform. He stated, however, as a witness at the trial of the case that he had declined payment for the reason that he was of the opinion that this court was without jurisdiction to appoint a guardian, irrespective of the plain and unmistakable provisions of the statute. The law has not conferred upon the Auditor of The Panama Canal authority to pass upon the jurisdiction of this court. Had he desired to relieve himself of all responsibility in the matter he might well have filed a bill of interpleader in the court and tendered the money, and the order of distribution of this court of the funds so deposited would have exempted him from any and all responsibility whatsoever in the matter.

The further contention of the auditor that there is no property within the Canal Zone, and that for that further reason the court was without jurisdiction, can not be sustained. The fund in question is the amount awarded for the condemnation of property situated within the jurisdiction of this court, and the proposition that this court is without jurisdiction to appoint a guardian to receive and receipt in full for these funds and hold the same subject to the order of the court is manifestly unsound. The statement of the proposition carries its own answer.

The auditor likewise urges that in this matter he is not the final auditor, but that the Auditor for the War Department (to whom the matter was never so much as referred for a ruling or opinion), is the party responsible for the views that he, the respondent, entertains.

In view of the decision of the United States Circuit Court of Appeals for the Fifth Circuit (241 Fed. Rep., 577), and affirmed by the U. S. Supreme Court, in the case of *Smith vs. Jackson*, wherein this same respondent, as auditor, urged a like contention, it is manifestly unnecessary for this court to deal with this phase of the controversy. It is apparent that in this case, as in the case above-cited, respondent as

Auditor of The Panama Canal has arrogated to himself functions that do not belong to him but which, on the contrary, are of a strictly judicial nature, and, as in the case above-cited, he has sought to shift the responsibility for his own dereliction of duty upon the Auditor of the War Department, who, according to the admissions of the respondent on the trial of this cause, was not even cognizant of what the respondent had done.

The only question herein which deserves serious consideration is that advanced by counsel for the relator, which is, that payment of the sum in question must be made to the guardian appointed by the court of the domicile of the insane person. But the evidence shows that relator was appointed guardian by this court in April, 1916, and the award of the umpire was rendered in October, 1917, and the said auditor refused to pay the relator in October and November, 1917, several months before any guardian had been appointed by the Circuit Court of Panama. The respondent would clearly have been derelict in his duty had he paid the fund in question to the guardian appointed by the court of a foreign jurisdiction, especially as such foreign guardian, appointed in Panama, has never so much as made application to this court to be appointed as ancillary guardian in the Canal Zone. As a matter of fact the guardian appointed by a foreign jurisdiction has no control whatsoever over the property of the ward within the Canal Zone. Counsel for respondent, however, relies largely, if not entirely, upon the case of *Wyman vs. Halstead*, 27 Law Ed., U. S. 1068. In this case the Supreme Court held that for the purposes of administration a simple contract debt is assets where the debtor resides, and that debts due from the United States are not local assets at the seat of Government only, and that letters of administration must be taken out in the States of the residence of the deceased instead of at Washington. But the above cited case differs essentially from the case at bar. The amount due in the present case is for the taking of real property situated within the jurisdiction of the court, and the proceeds of such property are universally considered as realty, although converted into cash, until the final distribution of the same. Therefore, there was and is property belonging to the insane person in the Canal Zone subject to the jurisdiction of this court. But, moreover, the fund here in question is more than a claim, more than a simple contract debt. It is an amount specifically awarded by the umpire of the Joint Commission, pursuant to the terms of the treaty for real property taken by the Government, and the money in payment thereof has been specifically appropriated by Congress and is now available under the direction and control of the respondent. His refusal to pay, under the circumstances, amounts, therefore, to a refusal to give effect to the act of Congress, appropriating money for the payment of such awards.

In the opinion of Mr. Chief Justice White in the case of *Smith vs. Jackson*, hereinbefore cited, the court saw fit to state that it was regrettable that the Government of the United States had been put to great expense by reason of the fact that this respondent had deliberately and wilfully failed to comply with the mandatory provisions of law as applicable to that case. Likewise in this case the action of the auditor will cost the Government of the United States 6 per cent per annum on a sum exceeding \$5,000 or approximately \$300 per year, for a considerable length of time, in addition to the costs of this litigation. All of these costs will have to be incurred by the Government, of which this respondent is an official, solely because of the fact that he has failed to comply with his official duty. As stated by Judge Clayton in his opinion in the case hereinbefore cited: "His conduct, however good his intention may have been, hardly falls short of being shocking to the judicial sense of justice, proper and orderly procedure, in a matter that is clearly justiciable."

It follows that the relator is entitled to a writ of mandamus issued to the respondent, H. A. A. Smith, Auditor of The Panama Canal, directing and commanding him to forthwith issue the warrant, voucher, or certificate, for the payment to the relator, as guardian of the insane person, Francisco Ayala, of the sum of \$5,683.33 $\frac{1}{3}$ United States currency, with interest thereon from the 5th day of December, 1912, at the rate of 6 per cent per annum and said writ may issue accordingly.

Ex parte MARTINEZ, MORENO, and WARD.

(District Court, Canal Zone, Balboa Division, June 17, 1918.)

Civil No. 240.

1. ALIENS. DEPORTATION.

Aliens convicted of criminal acts in the Canal Zone may be deported therefrom as undesirables, to the country from whence they came under the provisions of section 10 of the Panama Canal Act and the Executive Order of February 24, 1917.

2. ALIENS. DEPORTATION. *HABEAES CORPUS*.

If the immigration authorities have jurisdiction to act, and the defendants are in custody and ground for their deportation exists, *habaes corpus* may not be resorted to for the purpose of securing a discharge from such custody.

3. ALIENS. DEPORTATION.

The rights to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of any sovereign and independent nation.

4. ALIENS. DEPORTATION.

By section 10 of the Panama Canal Act, Congress has granted to the President the power and authority to provide for the exclusion and deportation of aliens or undesirable persons from the Canal Zone. This is a proper exercise of

power. The President, by Executive Order of February 24, 1917, has provided that persons of certain classes may be excluded or deported from the Canal Zone, and the President has delegated to the Governor of The Panama Canal and his subordinate officers the power to act in such cases, either by exclusion or deportation of such persons, and this is held to be a proper exercise of power.

Attorney for plaintiffs, *Wm. C. McIntyre*.

Attorney for defendant, *Chas. R. Williams*.

JACKSON, District Judge. The petitioners allege that they are imprisoned and restrained of their liberty at and in the Cristobal jail, or in one of the jails of the Canal Zone, and that the civil Governor of the Canal Zone, acting under alleged authority which he claims under Executive Order of February 6, 1917, has issued orders for their imprisonment and detention, and has further ordered that they be imprisoned and detained until convenient to deport them from the Canal Zone to the land of their respective births; that is Manuela Martinez to Spain, Barbara Cadena Moreno to Colombia, and Daisy Ward to Jamaica, B. W. I., irrespective of the fact that all three of the said individuals have a legal status as *bona fide* residents and domiciled inhabitants of the City of Colon, Republic of Panama; that the said detention by order of the Governor is illegal in that there is no law by which any person may be imprisoned or detained by order of the Governor of the Canal Zone; that the intended deportation is illegal in that the only authority to deport from the Canal Zone is given by Act of Congress, approved August 11, 1916, Sec. 10 thereof providing for the return of undesirable persons to the country whence he or she came; that the deportation of an alien to any country other than that of his or her legal domicile is contrary to international law and to right and justice. Wherefore, petitioners pray that the writ of *habeas corpus* issue directed to Joseph Randolph, Canal Zone police, or to Guy Johannes, chief of the Canal Zone police, and that the court order their immediate liberty.

The return of the respondent, Guy Johannes, is to the effect that the petitioners are now confined in the Cristobal jail under and by virtue of orders of the Governor of The Panama Canal, copies of which are attached, and respondent, therefore, denies that the said imprisonment and detention are without legal authority.

The three petitioners were arrested on the 6th of June, 1918, upon affidavits charging them with wilfully and unlawfully loitering in and about the town of Cristobal for the purpose of prostitution without any lawful business. On the 7th of June they were duly arraigned and pleaded not guilty, and the evidence considered, they were adjudged guilty and fined \$25 each for Barbara Cadena Moreno and Manuela Martinez, and \$15 for Daisy Ward.

After the payment of their fines in the magistrate's court the petitioners Manuela Martinez and Barbara Cadena Moreno were held by virtue of orders of the Governor of The Panama Canal, which orders were, however, not signed by him until June 8th, the day after the fines in question had been paid. The petitioner Daisy Ward was by some inadvertence permitted to depart from the court at Cristobal after the payment of a fine of \$15 although there existed at the time a verbal order of the Governor for her detention. She was, however, brought back to Cristobal from Colon pursuant to a signed order of deportation of the Governor of date June 10th.

The attention of the court has been called to the fact that the Commanding Officer of the U. S. Troops stationed in the Canal Zone, has, under date of June 14, 1918, promulgated an order, sections 8 and 9 of which are as follows:

8. That it shall be unlawful for any person who heretofore has been, who now is, or who may hereafter be practising prostitution or pandering, or who heretofore has been, who now is or who may hereafter be registered or licensed as a prostitute, to enter upon or pass through the territory or waters of the Canal Zone.

9. Any person violating any of the provisions of sections 1 and 8 of this order shall be punished by a fine not to exceed five hundred dollars (\$500) or by imprisonment not exceeding a year, or both, in the discretion of the court, for each and every violation thereof.

It is suggested that the provisions above-quoted are all sufficient for the purpose in view, and that by means of the punishment there provided, prostitutes may be prevented from coming into the Canal Zone from the Republic of Panama, without resorting to the drastic measure of deportation to some other country. Indeed, that this order would seem to negative any preexisting authority of the Governor to make such deportation. But the question as to the right of the Governor to order the deportation of the petitioners must be determined by the Act of Congress of August 21, 1916, and the Executive Order of the President of the United States of February 24, 1917, in pursuance thereof. It is not the province of the court to inquire into or pass upon the severity or the leniency of a legislative enactment, as to whether it is sufficient to meet the evil proposed to be remedied, or whether it goes in excess of the requirements therefor. If an act is not sufficient for the purpose in question an appeal to Congress may cause a revision. If it is too drastic it may be repealed. But while it exists on the statute book the plain duty of the court is to find its just meaning, and to interpret it and to execute it in the plain words of the statute.

It would undoubtedly seem that an enforcement of the order of the Commanding General, issued subsequent to the orders for deportation herein, would be all sufficient for the evil attempted to be remedied, and that thus the undesirable presence in the future of the three petitioners in the Canal Zone would be effectually prevented; so that,

in view thereof, their deportation respectively to Spain, Colombia, and Jamaica, might appear somewhat drastic. Especially would it so appear in the case of the deportation to Spain of Manuela Martinez. This unfortunate girl came to this country with her parents (Spanish laborers) in the year 1907, when she was a mere child of 9 years of age. She is now 20 years of age, and has lived here continually ever since. She was married here and has an infant child dependent upon her for support. She of the three is best entitled to claim a genuine *bona fide* domicile in Colon, and her deportation to Spain at this time and under the circumstances might be fraught with much hardship and danger. But we are living in a drastic age, when, as never before, the welfare of the individual must be subordinated to the welfare of the nation, whose honor and whose existence are at stake. And what the court is here called upon to decide is the authority of the Governor, and whether the question is one solely for his judgment and determination. This brings us to consider the acts in question.

Section 10 of the Panama Canal Act provides that after the Panama Canal shall have been completed and open for operation the Governor of The Panama Canal shall have the right to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone, as may be necessary. No general rules or regulations were promulgated pursuant to this section, but on August 21, 1916, Congress enacted as follows:

The President is hereby authorized to make rules and regulations, and to alter and amend the same from time to time, touching the right of any person to enter or remain upon or pass over any part of the Canal Zone; for the detention of any person entering the Canal Zone in violation of such rules and regulations and the return of such person to the country whence he or she came, on the vessel bringing such person to the Canal Zone, or any other vessel belonging to the same owner or interest and at the expense of such owner or interest.

It is the contention of attorney for the petitioners that by this provision the power of the President in all matters of deportation is limited to the return of the person to the country whence he or she came, and that any Executive Order of the President inconsistent with said provision is lacking in authority and void. But a careful consideration of said section 10 of the Act of August 21, 1916, above-quoted, indicates that the words "to the country whence he or she came, on the vessel bringing such person to the Canal Zone, or any other vessel belonging to the same owner or interest," were intended to be applicable only to one class of cases, namely, to those persons who arrived upon vessels into the Canal Zone, and who, not being permitted to land by reason of the quarantine or other regulations, must necessarily be sent back to the country whence they came on said vessel or other vessel belonging to the

same owner or interest. It is evident that the restriction "to the country whence he or she came," was intended to apply only in these specified instances, and that the President was given power in other instances wherein no such limitation was imposed, for he has the right, pursuant to this section, to make rules and regulations "touching the right of any person to enter or remain upon or pass over any part of the Canal Zone; for the detention of any person entering the Canal Zone in violation of such rules and regulations." This would seem to indicate that any person coming into the Canal Zone otherwise than upon a vessel from which he was not allowed to land, might be detained and removed or deported therefrom without reference to the country whence he or she directly came. It can not be said, therefore, that the President was without authority to make rules and regulations looking to the deportation of persons from the Canal Zone. And by virtue of the Executive Order of February 6, 1917, the President has declared in Sec. 1 as follows:

The Governor of The Panama Canal is hereby empowered to exclude, or to cause to be excluded, the following classes of persons from the Canal Zone * * *; and the governor may expel from the Canal Zone and deport therefrom, any person convicted of a criminal offense of the grade of felony, or whose presence, in the judgment of the governor, would tend to create public disorder, or in any manner impede the prosecution of the work of opening the canal, or its maintenance, operation, sanitation, or protection.

The latter provision of the Executive Order, which was promulgated pursuant to the Act of August 21, 1916, expressly confers upon the governor the power to deport any person whose presence in the judgment of the governor would tend to create public disorder, or in any manner impede the prosecution of the work of the opening of the Canal, or its maintenance, operation, sanitation, or protection, and this without any restriction as to the place to which said person may be deported. Surely in view of the conditions now prevailing as a result of the war with Germany, and the presence of the many soldiers on the Canal Zone, the governor would be justified in his judgment that the presence of prostitutes would tend to create public disorder, if not actually tend to impede the protection of the Canal itself. But, moreover, it is elementary that the judgment to be exercised in such cases, being conferred upon a governor or other executive officer, is necessarily final and conclusive and not reviewable by the courts. As stated in *Fong Yue Ting vs. United States*, 149 U. S., p. 698.

* * * the right to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of any sovereign and independent nation; the power of Congress to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to remain in the country has been made by Congress to depend.

On page 713 the Supreme Court in said case stated as follows:

Although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might entrust the final determination of those matters to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

And in *Ekin vs. the United States*, 142, U. S., p. 659, the Court said:

It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and sense of self preservation, to forbid the entrance of foreigners within its domains, or to admit them only in such cases and upon such conditions as it may see fit to prescribe * * * but on the other hand, the final determination of these facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which the statute gives a discretionary power to an officer to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or to controvert the sufficiency of the evidence upon which he acted. It is not within the province of the judiciary to order that foreigners who have never been naturalized, or acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitution and lawful measures of the legislative and executive branches of the national government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

It would seem to follow from the foregoing that the Governor of The Panama Canal clearly had the power by virtue of the Executive Order of February 24, 1917, to deport the petitioners from the Canal Zone, and that his judgment as to whether or not they should or should not be deported, and the place to which they should be deported, are questions confided solely and exclusively to his judgment, and are not reviewable by the courts. In the light of these decisions and in the light of the construction which this court gives to the Act of Congress and the Executive Order in question, the decision of the U. S. District Court in the case of *Leo Hem Bow*, 47 Fed. Reporter, page 302, relied upon by counsel for petitioners, is not in point, for that was a case of Chinese exclusion, wherein the Act of 1882 expressly provided that any Chinese persons found to be not lawfully entitled to enter or remain in the United States, should be deported "to the country from whence he came." As heretofore stated, there is no such express limitation contained either in the Act of Congress or the Executive Order in question. But even so, it might well be urged that the decision of the governor in this respect; that is, as to the country from whence the

person to be deported did in fact really come, is likewise final and not reviewable by the Court, for it was stated by the Court in the case of *Leo Hem Bow* that "an order of a United States commissioner that a Chinaman be deported to the Empire of China, based upon a finding that that is the country from whence he came, will not be reviewed by the District Court, upon a proceeding by a writ of *habeas corpus*, where the petitioner alleges no illegality in the decision of the commissioner other than error in said finding."

Counsel for petitioners, however, relies largely upon the decision of Judge Swan of the United States District Court in the case of the *United States vs. Chong San*, wherein the Court states as follows:

While the power of the sovereign authority to exclude foreigners from our shores is unlimited that of deportation is qualified by international law, which does not permit a nation to make a penal colony of another country or compel that country to receive back such of its subjects as have voluntarily selected a domicile elsewhere. The banishment of offenders to their native country, or that of their ancestors, regardless of the political rights of the individual and his relations to another power, may prove a just ground of international complaint.

But it is doubtful if this is a correct exposition of the principle of international law in this respect, for many writers contend that the country of the nativity can not refuse to receive back a deported citizen or subject; and, furthermore, it is doubtful that, even if the principle be correct, it is applicable to the case of prostitutes, the question of whose *bona fide* domicile in any particular community is doubtful and transitory. If in fact this question entered into the equation it would seem that it might be one for the decision of the governor and not reviewable by the Court. But it is to be noted that Judge Swan further stated as follows:

The imperfections of the law, the extent of our boundary line, the facilities it affords for the repetition of attempts to enter the country, and the want of cooperative legislation in adjoining countries, combine to make the seclusion of this class most difficult; but these are errors to be remedied by the legislative and state department, not by the judiciary.

As heretofore stated, it would seem that Congress in this instance has met the difficulty by not specifically requiring the person to be deported to the country from whence he came, leaving this to the judgment of the governor, so that if any question of international law should thereafter arise in deporting parties to the countries of their nativity, it would be one calling for diplomatic correspondence, and not for intervention on the part of the court. Moreover, the decision of Judge Swan seems not to have been followed in this respect for in *United States vs. Lee Kee*, decided by the three judges of the Circuit Court of Appeals, Ninth Circuit, May 5, 1892, and reported in Vol. 116, Fed. Rep., it was decided as follows:

Chinamen arrested just after crossing into the United States from British Columbia should be deported to China under Act May 5, 1892, No. 2 (27 Stat. 25), there being

no evidence that they were citizens of or subjects of British Columbia, but merely that they had lived there between one and a half and three years, and had property there, and no trick being played on them in the matter of their arrest, further than that the person who drove them to the boundary line disclosed to the officers the nature of the work he was engaged in.

Moreover, the specific question here involved would seem to have been clearly decided in the case of the United States *vs.* Williams, Commissioner of Immigration, 187 Fed. Rep., p. 470, which opinion, being short, is herein quoted in full as follows:

This case comes up upon return to a writ of *habeas corpus* issued to inquire into the detention of the relator by the immigration authorities at Ellis Island, in this district, under warrant of deportation issued by the Secretary of Commerce and Labor. The relator was arrested upon warrant of the Secretary of Commerce and Labor, has had a hearing, and is about to be deported as an alien who has entered the country within three years and is within the excluded classes. It is not necessary to take up the question of the grounds of exclusion, as those are concededly not within the jurisdiction of this court. The question presented is as follows: The relator came into the country more than three years before the warrant was issued from the port of Rotterdam, in the kingdom of Holland. Shortly before the arrest, being in the city of Niagara Falls, in the state of New York, he took a carriage and went over to the Canadian side of the falls, apparently for the purpose of viewing them. After staying there an hour or more, he came back into the State of New York. The warrant of deportation directs that he shall be deported to the Empire of Austria. Three questions are raised: First, whether he made a new entry into this country when he came back across the Canadian line; second, whether, if he can be deported at all, it should be to Canada, to Holland, or to Austria; third, whether, in case he should be deported to Canada, this court has any jurisdiction to grant a writ of *habeas corpus* because he is to be deported to Austria. The relator is a native of the Empire of Austria, and was en route from Austria to this country when he embarked at Rotterdam, more than three years prior to the issuance of the warrant.

The first question to be determined is whether the relator entered this country within three years of the time of his arrest. Since the decision of the Circuit Court of Appeals of this Circuit, *in re Annie Lapina Ex parte Hoffman* (179 Fed. 839, 103, C. C. A. 327,) this question has been authoritatively settled. I do not see how the duration of the period of absence in a foreign country or its purpose can affect the result. This particular instance is no doubt as extreme as can arise, but it does not affect any change in principle. As soon as the relator entered the Dominion of Canada he left the United States, whether his intention was to remain an hour or a year, and his reentry was in fact a reentry as much as that of Lapina in the case cited. Therefore I see no escape from the conclusion that he could legally be deported to the country whence he came by warrant of the Secretary of Commerce and Labor.

Two questions therefore arise: First, whether Austria is the country whence he came; and, second, whether if this be not so, a writ of *habeas corpus* can inquire into his proposed destination. I do not think that it is necessary to determine the first question, for I do not see how a writ of *habeas corpus* can review such a mistake, if it be a mistake, on the part of the authorities. That writ inquires simply into the validity of the relator's detention, and concededly his detention is legal. Even if it be true that the Secretary of Commerce and Labor intends to deal illegally with him, and even when that intention appears from the very warrant under which he is detained, the writ on that account could not release him from custody, unless he has the right to remain in the country, which he has not.

It is suggested that he might be released upon the theory that his detention would become illegal as soon as they did with him what the law does not permit. The difficulty with this argument, however, is that he would none the less be properly in custody and subject to deportation because they were violating the law in sending him to the wrong place. The detention being legal, at most a court could direct the Secretary of Commerce and Labor to send him to Canada, and not to Austria; but that, of course, no court has jurisdiction too do. It is only after the court has adjudged that the alien has a right under the statute to remain in the country that a writ of *habeas corpus* can release him. *Chin Yow vs. U. S.*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369.

Whether the relator has any remedy to control the action of the Secretary of Commerce and Labor, in case he proposes to deal with him contrary to the statute, it is not necessary now to inquire because it is enough that the scope of this writ is limited to the mere question of his detention, and whether he is entitled to be free from custody. It is, of course, possible to put supposed cases where the action of the Secretary of Commerce and Labor would be of the utmost consequence to the relator, and where, if he were in error, his rights would be much prejudiced by the decision; but that can in no sense result in releasing him wholly from custody, which is all that he now asks to have.

Writ dismissed, and alien remanded.

It is urged by the counsel that the question of the petitioner Daisy Ward is upon a different footing in that having paid her fine of \$15, and having been discharged and released from custody and returned to her home in the City of Colon, she could not thereafter be rearrested by the police of the City of Colon and returned to the Canal Zone for the purpose of deportation, and that, therefore, her detention is without legal authority, but this question would likewise seem to be resolved by the decisions heretofore referred to in the cases of the *United States vs. Lee Kee*, 116 Fed. Rep., 612, and *United States vs. Williams*, Commissioner, 187, Fed. 470. If the governor originally had the right to deport the said Daisy Ward and had given a verbal order to that effect, and she had departed from the Canal Zone before the order for her detention was executed, there seems no reason why she might not be brought back to await such order of deportation as the governor might make; and, as stated in the case of the *United States vs. Williams*, *supra* "*habeas corpus* will only lie to release an alien after he has been adjudged entitled to remain in the country." And in the case of *Ekin vs. the United States*, 142 United States, p. 651, it was held that under the Act of March 3, 1891, chapter 551, forbidding certain classes of alien immigrants the right to land in the United States, "upon a writ of *habeas corpus*, if sufficient grounds for the prisoner's detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment." On page 662 of this decision the court further stated as follows:

A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can law-

fully be detained in custody; and if sufficient ground for his detention by the Government is shown he is not to be discharged for defects in the original arrest or commitment.

Therefore, if it be conceded in the case of Daisy Ward, that her rearrest and commitment after having paid her fine, and after having returned to Colon, were illegal, nevertheless, as she had no right to come upon or remain in the Canal Zone, and as the governor had the power to deport her for this original infraction, it would seem clear, under the authorities above-quoted, that the question of her detention can not be raised by *habeas corpus* proceeding.

Viewed in this light the decision of the United States Circuit Court of Appeals at New Orleans in the case of J. Budd Smith, appellant, *vs.* J. A. Corrigan and others, is not, as the court was at first inclined to think, in point. In the case of J. Budd Smith the Circuit Court of Appeals stated as follows:

The judgment rendered in the contempt proceeding is not sustainable even if the appellant was subject to be punished for disobeying an order which was never made effective by valid service of process. The only service upon him of the order commanding him to appear and show cause why he should not be attached for contempt was made while he was in jail, held as an extradited prisoner. It seems that this was not permissible because of the court's lack of right to exercise jurisdiction of the appellant for any purpose other than the one for which he was delivered by the Panamanian authorities, unless the exercise of jurisdiction is based upon something happening after the extradition.

However, the question of *habaes corpus* was not raised in the case of J. Budd Smith, and it was not intimated that he would have been released on habeas corpus as long as he was being held under the order of extradition for a criminal contempt, although the intention of the authorities might have been merely to proceed against him for a civil contempt.

For the foregoing it follows that the writ must be dismissed and the three petitioners remanded.

RANCE *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division, July 3, 1918.)

Civil No. 199.

1. MASTER AND SERVANT. NEGLIGENCE. EMPLOYERS' LIABILITY LAWS.

Where plaintiff, while in the employ of the Panama Railroad Co., was injured as the result of the negligence of a fellow-servant, held that such fact did not bar recovery under applicable Federal Employers' Liability Law.

2. MASTER AND SERVANT. EMPLOYERS' LIABILITY LAW.

Since the Employers' Liability Act of 1916 does not declare that the remedy thereunder is exclusive, the plaintiff may recover under the Employers' Liability Law of 1910.

Attorneys for plaintiff, *E. A. Reid* and *E. Aizpura*; *Todd* and *MacIntyre*.

Attorneys for defendant, *Feuille* and *Van Dame*.

JACKSON, District Judge. This is an action for damages for personal injuries sustained by reason of the alleged negligence of the defendant company. The defendant interposes a demurrer, the basis of which is that the negligence, if any, was that of a fellow servant, and that under the ruling of the Circuit Court of Appeals in the case of the *Pacific Mail vs. Beneby*, 250 Fed., 444, an action does not lie against a defendant for injuries caused by the fault or negligence of a fellow servant. As stated in defendant's brief the complaint shows on its face that the injuries to the plaintiff complained of were caused by an employee of the defendant engaged in trucking freight on pier No. 8 belonging to defendant company, and that the plaintiff received his injuries while working as a checker on the same pier for the defendant company. The defendant, therefore, claims that it is evident from the face of the complaint that the plaintiff and the employee, whom he charged as having injured him, were both engaged in the same general business of the defendant, and, in consequence, they were fellow servants to each other. In his brief counsel for defendant further states as follows: "It has been the contention of counsel for the Railroad Company that the common law doctrines prevailing in the United States are not in force in the Canal Zone. We have been overruled in our contention, but we are now asking that if the rules of the common law are to prevail in the court of the Canal Zone, they be applied in this case."

The answer to the argument so clearly stated by counsel for the defendant is that in the cases of the *Pacific Mail vs. Beneby* and the *Bergen Point Iron Co. vs. Shaw*, decided by the Court of Appeals of the Fifth Circuit, 249 Fed., 466, that the court did not have before it the interpretation of the Federal Statutes here in question. It was dealing with common law facts and defenses, and rendered a decision pursuant to the principles of the common law. The act which that court was in effect construing was Art. 2341 of the Civil Code of Panama, and it was decided in the case of *Panama Railroad Co. vs. Bosse*, 239 Fed. Rep., p. 303, that said Art. 2341 of the Civil Code of Panama enunciates nothing more nor less than the common law doctrine of liability for negligence. Whereas, plaintiff in the instant case

predicates his right of recovery upon the provisions of the Federal Employees' Liability Acts of 1908 and 1910, and it is apparent that pursuant to the provisions of this act the defense of fellow servant does not apply. The case of Beneby and Shaw did not come within the provisions of the Federal Employees' Liability Acts of 1908 and 1910, since they were not employees of any railroad company specifically embraced within the provisions of these acts, and, therefore, it is apparent that, while common law defenses, such as fellow servant, may have been properly applied in those cases, they have no application to the case at bar.

But it is further contended by the defendant that, if not prevented from recovering by reason of the defense of fellow servant, they are not prevented by virtue of the Panama Canal Act of August 24, 1912, and the compensation orders of the President pursuant thereto of February 26, 1913, and March 20, 1914; or, better stated, that, pursuant to previous decisions of this court, it was held that these compensation orders of the President, issued under the Panama Canal Act, constituted the sole and exclusive remedy of the injured employee, and it is argued that under the Compensation Act of 1916 this principle and ruling are still applicable. However, it will be noted that this court, in its former decisions, based its ruling upon the fact that the said Compensation Orders of the President of 1913 and 1914 expressly stated that the compensation therein provided should be the "exclusive remedy" of the injured employee. It can not be said, and this court never, in fact, held that the compensation orders of 1913 and 1914 did, in fact, repeal the Federal Employees' Liability Acts of 1908 and 1910, but that they merely provided another remedy; that is, the right to receive compensation pursuant to the schedule established. Counsel for defendant in his brief states as follows:

By virtue of sec. 5 of the Panama Canal Act of August 24, 1912, the President was authorized to establish an injury compensation schedule in all cases in which injury resulted to Panama Railroad employees while actually engaged in the work of the railroad. If the President's schedule of compensation promulgated under the Panama Canal Act, were still in force, it is quite clear that the only remedy that Rance would have would be under this schedule because the injury occurred to him while actually engaged in work for the railroad on the pier, and for that reason he could have no recovery under the Act of Congress of 1908.

But the President's schedule of compensation, promulgated under the Panama Canal Act, is not now in force, and, therefore, we are compelled to look to the act entitled "An Act to Provide for the Compensation of Employees of the United States suffering injuries while in the performance of their duties; and for other purposes," passed September 6, 1916.

The first paragraph of this law provides that the compensation to injured employees shall be paid out of the Treasury of the United

States, and Sec. 40 of the same law provides that the term "employee" shall include all civil employees of the United States and the Panama Railroad. However, this Act of September 6, 1916, does not state, as did the President's compensation orders, above referred to, that the said Act of 1916 is the exclusive remedy of the injured employee. And inasmuch as the former rulings of this court were based upon the exclusiveness of the remedy contained in the President's compensation orders, and whereas, the Act of 1916 does not declare that the compensations therein provided are exclusive, the court considers that this act, while it does repeal the former Presidential compensation orders, does not repeal the Federal Employees' Liability Acts of 1908 and 1910 in its relation to employees of The Panama Canal; and inasmuch as the plaintiff in this case especially predicates his right of action under the latter act, it follows that the demurrer must be and is hereby overruled.

CURTIS *versus* WHITAKER, *et al.*

(District Court, Canal Zone, Cristobal Division, July 9, 1918.)

Civil No. 185.

1. MORTGAGES. NOTES. ACTION ON NOTE.

Where defendants executed a note to the plaintiff and a mortgage securing the same, the plaintiff may sue and recover on the note without first exhausting the security.

Attorney for plaintiff, *William C. MacIntyre*.

Attorney for defendant, *C. P. Fairman*.

JACKSON, District Judge. The plaintiff seeks to recover from the defendants the sum of \$387.95, with interest thereon at the rate of 6 per cent per annum from the 12th day of June, 1915, on account of money loaned.

It appears from the evidence that a mortgage under date of the 10th of December, 1914, on certain lands in Florida was given by the defendants to secure the payment of the original debt of \$375, and that thereafter the defendants made, executed and delivered to the plaintiff on the 20th of November, 1915, their certain warranty deed for the premises in question, but it is evident from the evidence that this deed is likewise to be considered as security for the payment of the original debt and not, in fact, a transfer of the property in satisfaction thereof. As a matter of fact, coincident with the delivery of the deed in question the plaintiff deposited in the International Banking Corporation cer-

tain shares of stock of the Panama Brewing Co. as security for the return of the deed in question. The sole question, therefore, that arises for consideration is as to whether or not the plaintiff can sue on the original indebtedness without first having exhausted his remedy by a foreclosure proceeding against the property in question situated in the State of Florida. A consideration of the authorities leads me to the conclusion that the creditor has the right to ask for a personal judgment on the original indebtedness without first looking to the security of the mortgage. To this effect see Cyc. Vol. 27, p. 1274 as follows:

In the absence of a covenant in a mortgage to pay the mortgage debt, the mortgage is not of itself an instrument which imports personal liability, and no suit can be maintained upon it as substantive cause of action, the mortgagee's remedy being confined to the land put in pledge. But a personal action may be maintained if the mortgage is accompanied by a note or bond, or other evidence of debt, or if the intention of the mortgagor can be made out by fair implication, or upon the production of evidence of a subsisting debt or claim and of the mortgagor's promise or agreement to pay, although such evidence is entirely extraneous to the mortgage, and even rests upon parol.

To the same effect see Cyc., Vol. 27, pp. 1746-7, as follows:

If the mortgage contains no covenant or promise to pay, and there is no separate written obligation, the relief awarded in the foreclosure suit must be confined to a sale of the mortgaged premises, and there can be no judgment against the mortgagor personally either for the whole debt or the deficiency. But this does not mean that the mortgagee may not recover the unsatisfied balance of the original debt which the mortgage was given to secure, but only that he must do so in a separate action, subsequent to, or independent of, the foreclosure suit.

From the foregoing it follows that the plaintiff is entitled to judgment for the amount sued for, namely, \$387.95, with interest thereon, from the 12th day of June, 1915, at the rate of six per cent per annum. Judgment may be entered accordingly.

BURKETT, *et al.*, versus PANAMA ELECTRIC CO.

(District Court, Canal Zone, Balboa Division, July 11, 1918.)

Civil Nos. 217 and 230.

1. NEGLIGENCE. PERSONAL INJURY. PROXIMATE CAUSE.

Plaintiff and her minor son hired and were riding in a jitney which was struck by one of defendant's tram cars, resulting in injury to the plaintiff and her minor son. The tram car at the time was running at an unlawful rate of speed. The chauffeur of the jitney was negligent, in not taking precautions to avoid the accident. The motorman of the tram, if it had been operated at a lawful speed, could have seen the jitney and stopped in time to have avoided the accident, held:

1. That the motorman's negligence was the proximate cause of the injury.

2. That even though one negligently places himself in a dangerous situation it does not follow that he is precluded from recovery for an injury if it appears that the one causing the injury by the exercise of ordinary care could have prevented the same.

Attorney for plaintiff, *V. E. Bruno*.

Attorney for defendant, *Hinckley and Ganson*.

JACKSON, District Judge. The plaintiff, Mary Burkett, on her own behalf, and as guardian of her minor child, John Burkett, in separate actions in that behalf filed herein, seeks to recover damages for personal injuries sustained on December 30, 1917, in the town of La Boca by reason of a collision between a jitney, in which they were then being driven, and a motor car of the defendant company. It is alleged that the said personal injuries were wholly due to the negligence and carelessness of the defendant company, and to the careless and negligent manner in which its tramcar was being driven at the time. The defendant enters a general denial, and further alleges that if the plaintiffs were injured as alleged the injuries were caused wholly and exclusively by reason of the negligence of the chauffeur of the automobile in which said plaintiffs were passengers.

The collision occurred at a crossing in La Boca, and the evidence would indicate that the tramcar of the defendant company, while approaching this crossing, was running at an excessive and dangerous rate of speed, in excess of that permitted by the laws and ordinances in passing over street crossings. In fact, the motorman in charge of the said tramcar was arrested for violating the ordinance in this respect, was found guilty thereof, and fined \$100 in the magistrate's court, and on appeal to this court the said fine was reduced to the sum of \$25. It appeared from the evidence that the tramcar and the automobile were traveling in the same direction, and that the road over which the automobile was passing and the tracks of the defendant company are parallel for a considerable distance at the point in question, without anything to obstruct the view, the one from the other; that the driver of the automobile attempted to cross in front of the car, but for reasons, as to which the evidence is very conflicting, stopped his car in the center of the track, where the collision occurred.

We must, therefore, start with the assumption that the defendant was guilty of negligence as to the speed with which its car was being operated, and the question arises as to the defense of contributory negligence.

I think it may be stated as a sound proposition of law that, generally speaking, the negligence of the agent, servant, or employee, of a common carrier is not attributable to the passenger, for the very good reason

that the passenger has no control or authority over the agent of the common carrier, and the principle of *respondeat superior* is not applicable in such cases.

However, in the present case I am inclined to think that the chauffeur of the automobile was acting outside of the scope of his duties to his employer, and was at the time in question in fact representing the plaintiffs in the case, so that the negligence of the chauffeur might properly be attributable to the passengers. But conceding that the chauffeur did not exercise all the care and prudence that the circumstances demanded, the further question arises as to whether his negligence was a proximate contributing cause of the accident or whether, notwithstanding his contributory negligence, the direct proximate cause was the negligence of the defendant. If one carelessly places himself in a position of danger he is not necessarily precluded from recovering if it appear that the other who caused the injury might by the exercise of ordinary care have prevented the same by the exercise of due diligence. In other words, the question always reduces itself to what was in fact the immediate proximate cause of the injury.

Viewed from this standpoint I am satisfied that if the motorman had been running at a proper rate of speed and complying with the ordinance in such cases made and provided, and considering the location and opportunities he had for observing the movements of the chauffeur he could by the exercise of ordinary care have stopped the car in time to prevent the collision. The negligence of the company, must, therefore, be considered the proximate cause of the injury.

The injuries received by the plaintiff Mary Burkett and her son do not appear to have been either serious or permanent, and the case does not call for any large sum by way of damages. Under all the circumstances judgment may be entered for the plaintiff in the case of Mary Burkett for the sum of fifty (\$50) dollars, and in the case of Mary Burkett as guardian of her minor son, whose injuries appeared to have been more serious, in the sum of one hundred (\$100) dollars, together with their costs herein.

IN RE. PETITION OF BALLEEN, Guardian.

(District Court, Canal Zone, Balboa Division, August 1, 1918.)

Civil No. 288.

1. SUCCESSION. NATURAL CHILD. MOTHER.

Where a natural child dies intestate, single, and without issue, leaving the mother surviving, such mother under the civil code, inherits the property of such

child. And upon the death of the mother, intestate, such property descends to her children or their heirs.

Attorney for Ballen, *Samuel Lewis*.

Attorney for respondents, *Fabrega and Arias*.

JACKSON, District Judge. The petitioner, Daniel Ballen as guardian of Laura Lopez Mudarra, Ernestina Lopez Mudarra and Rodrigo Lopez Mudarra, appears herein praying the court for an order for the payment to said minors of the sum of \$1,388.89 U. S. currency, deposited in this court in accordance with the award No. 170 of the Joint Commission, dated the 12th of March, 1918.

The question involved is that of the distribution of the estate of one Jose Jiron, who died in 1876, leaving six natural children, namely, Angelica Saturnina, Josefina, Juan, y Maria de la Visitacion as children of the same mother, Maria de los Reyes Villarreal de Jiron, and Feliciano, and Jose Magdaleno as children of the same mother, namely Andrea Noriega. It is conceded by both parties that on the death of the said Jose Jiron, sr., that the said six natural children above-named each inherited a one-sixth equal part in and to his undivided estate.

The admitted facts further appear to be that Andrea Noriega, the mother of Jose Magdaleno Jiron, and Feliciano Jiron, died before either of these, and that Maria de la Visitacion Jiron died before her half brother, Jose Magdaleno Jiron, and before her mother Maria de los Reyes Villarreal de Jiron, and also before her half sister, Feliciano Jiron, without leaving a husband or any descendants whatsoever. Also that Feliciano Jiron was married to one Ricardo Mudarra and died leaving four children, among whom was Elena Mudarra who married Juan Rodrigo Lopez. That Elena Mudarra inherited a one-fourth part of the estate which her mother, Feliciano Jiron, had hitherto inherited from her father, Jose Jiron, sr., at the time of his death, and that the part belonging to Elena Mudarra is to-day the rightful inheritance of her children above named.

It is the contention of the petitioner herein, representing as aforesaid, children of Elena Mudarra Lopez, that, inasmuch as Maria de la Visitacion Jiron died before her half sister, Feliciano, that the latter inherited a portion of the estate of the said Maria de la Visitacion Jiron, and that the petitioner herein, as guardian of these children, is entitled to the portion which they, in turn, inherited in this manner. Whereas, it is the contention of the respondents, Saturnina Jiron and Josefina Jiron, that upon the death of their full sister, Maria de la Visitacion Jiron, which occurred prior to the death of their mother, Maria de los Reyes Villarreal de Jiron, that the entire estate of the said Maria de la Visitacion Jiron passed to her said mother, and that upon the

death of the mother the interest acquired by her in and to the estate of Maria de la Visitacion Jiron passed absolutely to them. Article 1096 of the Civil Code of the State of Panama provides as follows:

Upon the death of a natural child who leaves no other legitimate descendants, nor natural children, nor parents, the half of his estate shall be inherited by the surviving spouse, and the other half shall go to the brothers who are legitimate or natural children of the same father or of the same mother or of both. All these brothers shall inherit simultaneously, but a full brother shall receive a portion double that of a half brother.

By virtue of this section the petitioners claim that upon the death of Maria de la Visitacion Jiron, unmarried, and without descendants, that the half sister, Feliciana Jiron, received a portion equal to one-half of that received by the other surviving full brothers and sisters, namely Angelica Saturnina, Josefina, and Juan. On the other hand the respondents contend that the brothers and sisters received nothing by way of inheritance upon the death of Maria de la Visitacion Jiron, but that her estate passed entirely to her mother, Maria de los Reyes Villarreal de Jiron, and that they, in turn, received their portion of the estate, formerly belonging to Maria Visitacion, from their said mother.

Art. 1049 of the Civil Code of the State of Panama provides as follows:

Upon the death of a natural child who leaves no legitimate descendants, nor natural children, his or her estate shall go to the surviving spouse, to the mother, or if the mother is not alive to the father. The estate shall be divided into three parts; two for the mother or father and one for the spouse. If there is no surviving spouse the entire estate shall go to the mother or the father.

Pursuant to this statute the respondents claim that the mother inherited from Maria de la Visitacion Jiron as her natural child, whereas the contention of the petitioner is that the mother did not so inherit because Maria de la Visitacion had never been recognized as a natural child, and, therefore, was to be treated only as an illegitimate child, so that Sec. 1049 of the Civil Code was not applicable, but that, on the contrary, all of the surviving brothers and sisters would inherit pursuant to Art. 1096.

Petitioner insists that pursuant to Art. 354 it was necessary that the mother should recognize the daughter as her natural child, and this, in fact, is the gist of the entire contention herein. Said article in Spanish is as follows:

Hijos naturales—Art. 354 * * * Los hijos naturales tendran legalmente la calidad de tales respecto de la madre, y tambien respecto del padre que los haya reconocido.

The translation is that natural children shall have the legal character as such with respect to the mother, and also with respect to the father who has recognized them. But it will be noted that there is a comma after the word "madre," and also that the verb is singular and not

plural, which would indicate that it is only the father who must recognize them. To have the significance contended for by the petitioner the article should read as follows:

Los hijos naturales tendran legalmente la calidad de tales respecto de la madre y tambien respecto del padre que los hayan reconocido.

The inference is clear that it is only the father who is compelled to recognize natural children in order to give them the legal character as such.

It is true that Art. 360 provides that the mother may recognize her natural children in the same manner as the father, said article in Spanish being as follows:

Art. 360—La madre puede reconocer a sus hijos naturales del mismo modo que el padre, conforme a lo dispuesto en los Art. 355, 356 y 357;

But the following article No. 361 seems to expressly recognize the children of the mother as natural children without any legal formality of recognition. Said article is as follows:

Art. 361—La calidad de hijo natural respecto de la madre que no le haya reconocido legalmente, tambien puede ser impugnada por las personas y por alguna de las causas que senala el Art. 359.

It seems, therefore, clearly established by the code that, while the father must recognize his natural children as such, either by will or public instrument, or in the presence of five witnesses as provided by the code, that there is no such requirement as to the mother; and this seems to me most reasonable, natural, and logical because any doubt that might exist as to who is the father of the child can never possibly exist as to the mother.

It may be well to note in passing that Jose Jiron, sr., and Maria de los Reyes Villarreal de Jiron were, in fact, married ecclesiastically, but not in accordance with the civil law, but the children born of the marriage are, nevertheless, natural children according to the law.

In view of the foregoing I feel constrained to adopt the view that, although Jose Jiron, sr., by his will recognized his natural children as such, and the mother, Maria de los Reyes Villarreal de Jiron, did not so do, nevertheless, Maria de la Visitacion had the legal status as a natural child as to her mother, and that, pursuant to Sec. 1094, the mother inherited from her natural daughter the one-sixth part of the estate, which the latter had inherited from her father, Jose Jiron, jr.; and it follows as a natural sequence from the foregoing that upon the death of the mother, Maria de los Reyes Villarreal de Jiron, the interest hitherto owned by Maria de la Visitacion passed to the other children, Angelica Saturnina, Josefina y Juan, and no part whatsoever thereof to the half sister, Feliciano, and for this reason the petitioners herein are not entitled to the share claimed by them by reason of their contention as aforesaid.

Petitioner lays stress upon the fact that by virtue of a certain instrument executed on September 29, 1883, it appears that a certain property belonging to Jose Jiron, jr., was sold and that in the deed of sale it was stated that two-thirds thereof belonged to Angelica Saturnina, Josefina y Juan, and the other one-third belonged to Feliciana Jiron. This occurring after the death of Maria de la Visitacion it is argued by counsel for petitioners that Maria de los Reyes Villarreal de Jiron did not, in fact, consider herself as the owner of and entitled to the share hitherto belonging to Maria de la Visitacion. But it does not appear that Maria de los Reyes Villarreal de Jiron was a party to the execution of the deed in question. In fact, the contrary would seem to appear because the minors were represented in the matter by their attorney in fact. But be that as it may, the action of Maria de los Reyes Villarreal de Jiron in not asserting or claiming any rights she might have had as against her three minor children can not possibly be considered as a waiver or relinquishment as to what she inherited by operation of law. She could only divest herself of this inheritance by deed, gift or devise, and there is nothing in the record of this case to show that she ever so dispossessed herself of the property inherited as aforesaid. Moreover, the property referred to in said deed was an entirely different piece of property from that here in question.

Stress is also laid upon the fact that the interest herein claimed does not appear in the inventory of the probate proceedings in 1885 in the estate of Maria de los Reyes Villarreal de Jiron. This may have been through inadvertance or mistake, of which there seems to have been many in the affairs of this estate. The mistake may be accounted for by the fact that it appears that the mother was appointed guardian of the minor children before the death of Maria de la Visitacion, and, pursuant to the law, she was required to make an inventory of the estate of the minors within 90 days, but the probate proceedings of the estate of Maria de los Reyes Villarreal de Jiron were had some time after the death of Maria de la Visitacion Jiron.

Another question raised by the pleadings in the case was that Jose Magdaleno Jiron had died prior to his half sister, Maria de la Visitacion, and that, pursuant to said Sec. 1096, Maria de la Visitacion had inherited her share from her said half brother, which share, in turn, passed to her mother, and finally, to the respondents herein, but this contention is now abandoned by respondents in their brief filed herein wherein they state as follows:

The memorandum filed by the plaintiffs maintains that the defendants claim not only the one-sixth portion inherited by Maria de la Visitacion Jiron which passed to her mother, Maria de los Reyes Villarreal de Jiron, but also that the said one-sixth portion passed to Mrs. Maria de los Reyes Villarreal de Jiron increased with the portion that Maria de la Visitacion Jiron obtained as heir of Jose Magdaleno.

"In this respect it must be pointed out that, inasmuch as counsel for the defendants became aware of the fact that Jose Magdaleno died after Maria de la Visitacion, the claim of the defendants had been modified in this particular, so that they maintain only that Maria de los Reyes Villarreal de Jiron inherited nothing more than the one-sixth portion that Maria de la Visitacion had out of the estate of her father, Jose Jiron, sr."

This waiver on the part of the respondents makes it unnecessary to consider the question raised and presented by petitioner in his brief as to whether or not Jose Magdaleno did, in fact, leave a will.

The award of the Joint Commission having been for \$50,000 and there being deposited in this court, subject to its order, the sum of \$1,388.88, it is hereby ordered, adjudged, and decreed, pursuant to the opinion heretofore expressed, that the said respondents receive of this sum the amount of one thousand two hundred and fifty (\$1,250) dollars, and the said petitioner the remainder thereof, or one hundred thirty-eight and 88/100 (\$138.88) dollars.

KING *versus* KING.

(District Court, Canal Zone Cristobal Division, September 18, 1917.)

Civil No 208.

1. DIVORCE.

An absolute divorce is preferred to a limited divorce.

2. DIVORCE.

Where parties were married in Oklahoma, the laws of that State will control the divorce action in this jurisdiction. (Compare *Barrett vs. Barrett*, 3 C. Z. Rep. p. 346.)

Attorney for plaintiff, *W. C. MacIntyre*.

Attorney for defendant, *W. H. Carrington*.

JACKSON, District Judge. As appears by the certificate of marriage offered in evidence herein the plaintiff and defendant were married in the Territory of Oklahoma June 20, 1904. There were born of said marriage, and are now living two children, namely, Margaret King, aged 9 years, and Thomas J. King, aged 6 years.

The plaintiff in his complaint seeking a divorce alleges adultery on the part of the wife, and also alleges that "the said parties although living under the same roof, have not been living as husband and wife, and for the said term of 3 years the said defendant has refused and still refuses to receive the plaintiff as her husband or to perform her marital duties." Also "that the said defendant has developed and exhibits such a bad temper that marital peace is impossible between

the spouses, and that the plaintiff suffers and has suffered much during the past 3 years on account of the cruelty of defendant as evinced by her said temper and her nagging disposition."

The defendant denies the allegations aforesaid, and, on the contrary, she asked that she be granted a separation *a mensa et thoro*, alleging as grounds therefor abandonment of marital duties on the part of her husband, habitual drunkenness, and cruel treatment. It will be noted that the husband requested a divorce *a vinculo matrimonio*, and the wife a separation *a mensa et thoro*. Under the laws of the Territory of Oklahoma in force and effect at the time of the marriage there existed as grounds for divorce, according to proof of the statute offered in evidence herein, the following: (a) Adultery; (b) abandonment for 1 year; (c) extreme cruelty; (d) habitual drunkenness; (e) gross neglect of duty. It is, therefore, apparent that applying the laws of the territory where the parties were married, which the court is entitled to consider, the court is empowered to grant either an absolute divorce or a limited divorce, of *a mensa et thoro*, and in passing on this feature of the case the court does not hesitate to adopt the view favorable to the absolute divorce. In so doing it considers it particularly pertinent to quote here the language of the celebrated French jurist, President Magnaud of the Judicial Tribunal of Chateau Thierry, as follows:

Considerando que la separación de cuerpos es una solución incompleta, hipócrata y contra naturaleza, que favorece las uniones clandestinas de las que salen esos desdichados seres sin completo estado civil sin filiación regular a los cuales nuestra legislación, sometida al yugo de los estúpidos prejuicios de la sociedad actual, trata indignamente y lo mismo que a verdaderos parias;

Que cuando no ha sido imaginada por uno de los esposos con el objeto de torturar indefinidamente al otro, es esta solución en la mayoría de los casos, debido a su carácter religioso impuesta por la influencia nefasta de personas entregadas al régimen del celibato y las cuales no tienen más hogar que el hogar del prójimo;

Considerando que el divorcio, por el contrario además de contener también la separación de cuerpos, es una solución leal y franca que al desatar el lazo conyugal que dos esposos contrajeron por error, asegura no tan sólo su completa independencia de cuerpo y espíritu, sino que abre también el camino a toda esperanza futura;

Que entre estas dos soluciones, los jueces convencidos de que, sobre todo en materias de orden tan íntimo, su misión tiene al menos tanto de social como de puramente jurídica no pueden vacilar en elegir la más humana y la más conforme con la realidad de la vida, esto es; el divorcio;

Por estos motivos:

Pronuncia el divorcio en tre los esposos A . . . desfavorablemente para los dos.

The English translation of which is as follows:

Considering that the separation of bodies is a solution incomplete, hypocritical and against nature, which favors clandestine unions, those from which issue forth those unfortunate beings without a complete civil status, without regular relationship, which beings our legislation, submitted to the yoke of the stupid biases of the present day society, treats unworthily and the same as it would actual outcasts;

That, when the separation has not been conceived by one of the spouses for the purpose of torturing indefinitely the other, this solution, in the majority of cases, is due to its religious character, imposed by the ominous influence of persons given up to the regime of celibacy, and who have no other home than the home of their fellow man;

Considering that divorce, on the other hand, besides containing also the separation of bodies, is a faithful and frank solution which, in untying the conjugal knot which two spouses contracted by error, guarantees not only their complete independence of body and spirit but also opens up the road to every future hope;

That between these two solutions, the judges convinced that, especially in matters of such an intimate nature, their mission has at least as much social as legal responsibility attaching thereto, can not hesitate in selecting the most human solution and the solution which conforms more to the reality of life, and that one is divorce.

For these reasons:

Divorce is entered between the spouses A . . . unfavorably for the two.

This court adopts in its entirety the ideas and views above expressed by this distinguished jurist as to the advisability, where possible, of the absolute divorce as against the separation of bodies.

Coming now to consider the grounds alleged for divorce by the husband as against the wife, namely, that of adultery, the court is of opinion that it is not necessary to make a judicial finding and determination on this subject because matters of such great delicacy not only go to prejudice the public morality, but also to seriously prejudice the future welfare of the spouses, and especially most lamentably affects the future of the children themselves. Evidence has been offered on behalf of the husband tending to prove adultery as against the wife, which fact she has as vehemently denied, and for the considerations above stated, the court refrains from passing upon this issue, basing its finding upon the allegations of abandonment for over 1 year, of cruelty, and gross neglect of duty. In each of these respects the court finds that from the undisputed testimony in the case the parties are mutually culpable, and that each is, for the three grounds stated, clearly entitled to a divorce as against the other. The court, therefore, concedes to each of the parties as against the other an absolute divorce, as provided by the laws of the Territory of Oklahoma, in which Territory the parties were married.

Coming now to consider the disposition of the children, and here it must be conceded that no more grave and serious obligation rests upon a court. It is the interest of the innocent children, above all others, that the court should have in mind. All things considered, it has seemed best that the father should be given the custody of the older child, the girl Margaret of 9 years of age, for a period of 1 year, and the mother the custody of the younger child, Thomas, for a like period of 1 year, and that each year the custody of said children alternate. Also that so long as it is practicable, the parties, remaining in the same community, that each party herein have the right and privilege of

visiting and seeing the child in the custody of the other for at least 2 days in each month.

It will also be provided that in case of the remarriage of the father he shall at once surrender the custody of the child Margaret to the care of the mother. A similar requirement is not imposed upon the wife for the reason that experience teaches us that the treatment accorded step-children by the stepfather is very different and far more considerate than that of the stepmother.

It will also be provided that until further orders the husband, Campbell Jefferson King, be required to contribute monthly to the support of his wife the sum of seventy-five (\$75) dollars, United States currency.

DIAZ *versus* PATTERSON.

(District Court, Canal Zone, Balboa Division, October 28, 1918.)

Civil No. 199.

1. PRESCRIPTION. DELIMITATION OF BOUNDARIES.

Article 785 of the Civil Code requires that more weight be given to recorded instruments describing real estate and its boundaries than the evidence of witnesses as to actual possession.

2. PRESCRIPTION. DELIMITATION OF BOUNDARIES.

Under article 2526 of the Civil Code, the aquisitive prescription of real property does not obtain against a recorded title except by another recorded title.

[NOTE]. This case went to the Circuit Court of Appeals, and was remanded for a new trial, (262 Fed., 899). Appeal was taken to the Circuit Court of Appeals (281 Fed., 394), and thence to the Supreme Court (263 U. S., 399).

Attorneys for plaintiff, *Fabrega and Arias and C. P. Fairman.*

Attorneys for defendant, *Hinckley and Ganson and Wm. C. MacIntyre.*

JACKSON, District Judge. The plaintiffs in their petition filed herein claim that they are the absolute owners, and entitled to the possession of a certain tract or parcel of land situated in the Canal Zone, Balboa Division, which parcel of land forms part of the estate of "Lo de Caceres," and is described as follows:

Starting from the "Mata Redonda," to the headwaters of the creek of the "Plantana," and along the latter down stream, to its confluence with the creek "Palangana," and following the natural course of this last-mentioned creek until reaching a point parallel with the old Royal Pass of "Rio Hondo" at the place used for crossing in order to go from this city to "Mata Redonda," and following in a straight line to the said pass it continues along the royal road of "Mata Redonda" aforementioned, as far as the place where the said road meets the boundary line between the Republic of Panama and the Canal Zone; therefrom it follows said boundary line in an east

ernly direction as far as monument marked "F" on said boundary line; and then it follows the said boundary line in a northwestern direction as far as the place where it meets a certain imaginary line that goes from "Macambo" to the "Mata Redonda" and then follows this imaginary line in a southerly direction as far as the "Mata Redonda," which was the starting point.

The said parcel of land here described which, it is alleged, consists of 682 hectares and 8,000 square meters, and which forms the basis of this action, the plaintiffs claim is a portion of the estate of "Lo de Caceres," the other portion of which is located in the Republic of Panama.

The plaintiffs have filed with their claim a certain Spanish Crown grant dated in 1736. From the description given in the said Spanish Crown grant it appears that the western boundary of the estate of "Lo de Caceres" was a straight line drawn from "Mocambo" to the headwaters of the Rio Hondo.

It is alleged that the said estate of "Lo de Caceres" after a chain of subsequent conveyances passed to Don Pedro Miro in 1832, who was at that time likewise the owner and entitled to the possession of the adjoining estate of "Mata Redondo;" and that the said Don Pedro Miro conveyed the portion known as "Lo de Caceres" to the Paredes family by instrument executed on October 12, 1832, wherein the original boundaries of the Spanish Crown grant were not followed, and the portion conveyed was described as being "from the "Mata Redonda" to "Mocambo" in a straight line and from the "Mata Redonda" on the side of "Pan de Azucar" the boundary shall be in accordance with the ancient titles.

It is further alleged that the said estate of "Lo de Caceres" ever since the year 1832 belonged to the Paredes family until the 27th day of April, 1895, when it was purchased at a public sale by Mrs. Catalina Lewis de Garcia de Paredes, and in this conveyance the boundaries of the entire estate of "Lo de Caceres," including both the portion now situated in the Canal Zone, above described, and the portion located in the Republic of Panama, are given as follows

A straight line from "Mocambo" to "Mata Redonda," thence to the headwaters of the stream of the "Platanar," and along the latter down stream, to its confluence with the stream "Palangana," and following the natural course of this last-mentioned stream until reaching a point parallel with the old royal pass or crossing of "Rio Hondo" at the place used for crossing in order to go from this city to "Mata Redonda," and following in a straight line to the said pass it continues along the royal road of "Mata Redonda" aforementioned up to a stream or ditch in the meadows and which runs south to north; said stream comprises a series of hills, with the hill of "Pan de Azucar" on the one and the other bank thereof until flowing out into the Sabanas. Continuing up this stream to some bushes where there are some wells, the source thereof, and from which point the source of a muddy ditch which empties into the "Mataznillo" is sought, continuing therefrom and uniting its waters in the "Mataznillo" with those of another stream flowing in a little further down, the meadows of the "Gallinero" are thereby closed, and which lay between these streams. Of those streams the one which is on the north side is the boundary of the lands of "Lo de

Caceres" up to its juncture with the river "Mataznillo;" and then along the "Mataznillo," up stream, until striking the imaginary line running to the summit of the hill of "Gallinero." This straight or visual line is drawn from the summit or highest part of the hill of "Barro Colorado," which hill is in view from the house of the estate of "Lo de Caceres," to the summit of the highest part of the hill of the "Gallinero" in the lands of the "Lo de Caceres," which hill can be located by drawing the visual line to the slope or lowest part of the hill "La Pava," and from this hill to the slope of Ancon Hill. From the summit of the hill of "Barro Colorado" another straight or visual line is drawn to the highest part of the small hill of "Bruno Cerda," which hill is in the vicinity of the headwaters of a stream serving as a bathing place for the estate of "Carrasquilla" and which empties within the vicinity of the front part of the slaughter house of Old Panama. From the headwaters of this stream, a straight line to the stream "Tesorera," and along this stream to "Mocambo," the starting point.

Mrs. Catalina Lewis de Garcia de Paredes conveyed to several parties an undivided interest on the said estate by instruments Nos. 189, 197, of 1908, and 58, 82, 89, and 106 of 1909, executed at the Notary Office No. 2 of the City of Panama. That the grantees thereof and Mrs. Catalina Lewis de Garcia de Paredes conveyed their respective interests to Domongo Diaz by instruments Nos. 59, 83, 94, 107, 121, and 133 of 1909 and 237 of 1910, executed also at the same notary office. That the said Domingo Diaz is now deceased but that Elisia Arosemena de Diaz, Isabel Diaz de Jimenez and Domingo Diaz A. are his legal representatives. The plaintiffs allege that the defendant, Guillermo Patterson, claims an interest in and to a certain portion of the real estate herein described, located in the Canal Zone, adverse to the plaintiffs and that the said claim of defendant is without any legal right whatever; that the defendant has not any estate, right, title, or interest whatever in the said land or premises, and that the defendant is out of possession and that the plaintiffs are in the actual possession thereof. Wherefore, plaintiffs pray that by decree of this court it be declared and adjudged that the plaintiffs are the owners of said premises and are entitled to the possession thereof, and that the defendant has no estate or interest whatever in or to said land or premises, and that defendant be forever debarred from asserting any claim whatever in and to said land or premises adverse to the plaintiffs.

The defendant in his answer filed herein claims that he is the owner of that certain estate adjoining that of "Lo de Caceres," known as "Mata Redonda," situated within the Canal Zone, bounded and described as follows:

Beginning at a point known as "Mata Redonda," duly marked as such and situated at a point where the estates of "Lo de Caceres," "La Gloria" and "Mata Redonda" meet, and thence in a northerly direction to the boundary line between the Republic of Panama and the Canal Zone at a point about midway between boundary monuments 86 and 78 thence in a general northwesterly direction, in a straight line, following the said Canal Zone-Republic of Panama boundary line to monument No. 80, situated on the right-hand side of said river going down stream; thence south, following the meanderings of the "Cardenas River" to the point at which the "Rio Palangana" flows

into the said "Cardenas River;" thence in a general easterly direction, following the meanderings of the "Rio Palangana" to the point at which the "Rio Platanar" flows into said "Palangana," and thence continuing in an easterly direction to the headwaters of the said "Rio Platanar," and thence in a straight line to the said point marked "Mata Redonda," the point of beginning, containing a superficial area of 1,101 hectares, as is more fully shown by the official map of the Isthmian Canal Commission, which is hereunto annexed, marked exhibit "A," and made an integral part of this answer.

Defendant alleges that he has been in the open, exclusive, notorious, uninterrupted, continuous, hostile, and adverse possession of the lands in dispute above described, through himself, his predecessors in interest, and his father.

The boundaries of the estate of "Mata Redonda" contained in defendant's Crown grant are given as follows: "On the lower part from the 'Mata Redonda' up to the . . . mita of the river Car . . . nas inc . . . ing its headwaters and springs bottomdown stream to the junction of the Plangana stream; and thence seeking a creek with a rocky bed which crosses the papaya field; and on the upper part from the hill called to the furtherest boundaries of 'Mocambo' lands."

And the boundaries given in the title whereby defendant acquired the property, dated in 1891, are:

From the "Peña Hueca" of this name "Mata Redonda," a straight line to the hill of the "Algarrobo" and thence to the hill of the "Vidrio," and thence to "Gordo" hill, circling around to the headwaters of the "Rio Cardenas" down stream, to the junction (or where it empties) of the stream "Palangana," and from this stream, up stream, to the stream "Platanar." Thence, this stream, up stream, to its headwaters, and source and thence in a straight line to the "Peña Hueca."

The defendant prays that he be affirmed in his ownership of the said land and improvements and that the plaintiffs recover nothing by their action.

The determination of the question here presented depends upon:

1st. The location of the "Peña Hueca" or the "Mata Redonda," referred to in the title deeds of both plaintiffs and defendant;

2d. Whether or not the piece of property herein in controversy has been acquired by prescription by one of the parties litigant, inasmuch as it appears that the said property in dispute is included within the description contained in the title deeds of plaintiffs and of defendant.

1. It has been a very difficult question to determine the exact location of the "Mata Redonda" or "Peña Hueca" above referred to. The plaintiffs maintain that this spot consists of a very large rock situated at a considerable distance to the west of "Rio Hondo" and quite close to the ruins of an old chapel designated as the chapel of "Mata Redonda," whereas the defendant claims that the said spot known as "Mata Redonda" or "Peña Hueca" is located close to the road of "Mata Redonda," on the eastern side of "Rio Hondo."

Numerous witnesses were examined on behalf of the plaintiffs and the defendant, and experts testified concerning the location of the said

spot, basing their conclusions on the interpretation of the descriptions contained in certain old title deeds referring to the properties in dispute.

The court is of the opinion that the spot designated by the plaintiffs in this case is the so-called "Mata Redonda" or "Peña Hueca," referred to in the deeds in question and that it is situated close to the ruins of the old chapel of "Mata Redonda," at a considerable distance to the west of the banks of the "Rio Hondo." The title deed of the adjoining estate of "San Jose" seems to show conclusively that the said spot is located as herein indicated and not on the Panama side of the "Rio Hondo;" that is on the eastern side. The title of "San Jose" of 1826 describes a certain pass or crossing of the said river, and in so doing states that it is "the place used for crossing the "Rio Hondo" in going from this city (Panama City) to "Mata Redonda." In other words, in order to locate "Mata Redonda," if we are guided by the description just quoted, it is necessary to go to the western side of "Rio Hondo." Again, the title deed of the same property of 1846, introduced in evidence by the defendant, describes the headwaters of the said "Rio Hondo" in a manner that would leave no doubt whatever that the "Mata Redonda" is on the other side (that is the western side) of the "Rio Hondo," inasmuch as it is stated that the said headwaters are found on the right hand side of the road that leaves "Mata Redonda" and goes to meet the Porto Bello Road. It is admitted by the defendant that the Porto Bello Road is located on this side (eastern) of the "Rio Hondo." Hence it follows that the "Mata Redonda" must be on the other side of the "Rio Hondo" and not as claimed by the defendant.

Furthermore, the decided preponderance of the testimony is in favor of the above view, which is also supported by the characteristics of the place in dispute.

2. The determination of the question of possession is not less difficult. Both parties to the action claim to have been in possession of the property in dispute. They both insist that for a long time they have built certain fences, collected rents at certain periods of time from some small tenants and kept cattle, within certain undetermined portions of the disputed premises. And the defendant also claims that his father had a residence constructed on a small portion of the premises. The question to determine under these facts would be whether a person can acquire by prescription a large tract of land of an area of something more than 1,600 acres.

Such a question has been decided in the negative by the highest court of appeal of the Republic of Colombia, wherein the same laws apply. In an opinion rendered on September 21, 1911 (*Gaceta Oficial*, Vol. 20, No. 284), the Supreme Court of Casacion stated this doctrine in the following terms:

In order to acquire by prescription a certain estate it is not enough to exercise possessory acts of the soil on some portions of that estate, if at the same time acts of

the same kind are done on other portions on behalf of another party who claims to be the owner thereof. In such a case the possession is not exclusive and can not, therefore, produce the ownership of the entire estate.

The possession and ownership of a person on undetermined portions of an estate can not be recognized inasmuch as one can not possess nor acquire by prescription an uncertain portion of a thing.

It seems clear to me that the enormous mass of testimony adduced by both parties relating to acts of possession of the soil on some undetermined and indefinite pieces of the land in dispute can not help the court in the determination of the issues involved.

And this must be so not only for the reasons just advanced but also because Art. 785 of the Civil Code provides that:

If the thing is of those whose tradition must take place by inscription upon the register of public instruments, no one can acquire the possession thereof, except by this means.

It seems clear, therefore, that the substantive law of the Canal Zone, in so far as real property is concerned, gives much more weight to the inscriptions of instruments in the public records than to the statements of witnesses bearing on possession. The Supreme Court of Casacion of the Republic of Colombia has commented on this question in the following manner:

If in a delimitation suit one of the parties attempts to prove that he has been in possession of the land in dispute by means of oral evidence, and the other party shows the same by means of a recorded instrument, the proof of the recorded instrument must prevail. (*Gaceta Judicial*, 1889, Tomo 3, No. 197).

From the foregoing it is evident that for the determination of the question of prescription it is necessary to examine the recorded possession which the parties may have to the lands in dispute.

The plaintiffs claim by reason of a certain title deed executed in 1832 wherein the boundary of "Lode Caceres" on the side of "Mata Redondo" is a certain imaginary line from "Mocambo Hill" to the "Mata Redonda." This line seems to be the one now claimed by said plaintiffs. The defendant on the other hand shows that he has title by a certain chain of conveyances starting from the 26th of March, 1859, down to 1891, wherein the boundaries of "Mata Redonda" are given in a manner that is clearly in conflict with that given in the "Lo de Caceres" deed of 1832.

The only way to decide the conflict that arose in 1859 is by bearing in mind section 2526 of the Civil Code, which reads as follows:

The acquisitive prescription of real property or of real rights constituted therein does not obtain against a recorded title, except by virtue of another recorded title, nor shall it begin to run but from the date of the record of the second.

This provision, taken together with section 2529 of the Civil Code, which requires 10 years for the acquisition of land by prescription, would have conferred on the defendant the ownership of the land in dispute by the year 1869. And this would be so because the prescription, as contemplated by the section just quoted, would begin to run not

from 1832 (which is the date of the record of the first deed), but from the year 1859 (which is the date of the record of the second deed), inasmuch as the predecessors in interest of the plaintiffs had not, during that period of prescription, interrupted the defendant's possession by means of another record.

There does not seem to be any doubt whatever that the defendant had acquired by 1869 by prescription a portion of the lands purchased in 1832 by the plaintiffs' predecessors in interest. But the question to decide is whether the title so acquired continues to the present time. We find that the last record effected by or on behalf of the defendant with reference to the lands in dispute took place in 1891. After that date neither the said defendant nor any one on his behalf has made any inscription on the Public Land Registry that would affect the recorded possession of the lands claimed. On the other hand we find that the plaintiffs, by their predecessors in title reasserted their recorded possession of 1832, which they had lost by prescription, by means of the registration of the public sale of the estate of "Lo de Caceres" that took place in 1895. In this public sale the old line of "Mocambo" to the "Mata Redonda" is again restated. Hence the conflict between the two estates reappears from the said year of 1895. Furthermore, after that year, several sales of undivided interests in the estate of "Lo de Caceres" took place and hence the corresponding inscriptions were affected, all of which show that public and open assertions of ownership, in the manner provided by law, were made by said plaintiffs or their predecessors in interest, in opposition to any and all claims of ownership of the defendant.

The court, therefore, finds that, applying section 2526 above quoted, prescription began to run in 1895 as against the recorded possession of the defendant; that the defendant has not interrupted that prescription inasmuch as he has no recorded title subsequent to 1891, and that as more than 10 years have elapsed since 1895, the plaintiffs have reacquired the lands in dispute.

The plaintiffs are, therefore, entitled to a decree in accordance with the above findings.

CASTILLA *versus* PANAMA RAILROAD CO.

ROCK *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Balboa Division, October 22, 1919.)

Civil Nos. 292-310.

1. DEATH. CAUSE OF ACTION. SURVIVAL.

A cause of action for damages for death caused by negligence, survives under Art. 2341, Civil Code.

2. ILLEGITIMATE CHILDREN. ACTION FOR DEATH OF ILLEGITIMATE CHILD.

In the Castilla case, the mother brought the action for damages for the wrongful death of her illegitimate child. It is held that the mother may recover; that illegitimacy is no bar to the maintenance of the action.

3. HUSBAND AND WIFE. RIGHT OF ACTION FOR DEATH OF WIFE.

In the Rock case, the husband brought the action for damages for the wrongful death of his wife. It is held that he is entitled to recover.

[NOTE]. In Castilla case Circuit Court of Appeals held mother not entitled to recover for illegitimate son (272 Fed., 656). In Rock case Circuit Court of Appeals affirmed judgment (272 Fed., 649), but Supreme Court reversed it holding action did not survive (266 U. S., 209).

Attorneys for plaintiffs, *MacIntyre and Todd*.

Attorneys for defendant, *Frank Feuille and Walter F. Van Dame*.

HANAN, District Judge. Both these cases are brought against the Panama Railroad Company, a corporation of New York, operating a railroad from the city of Panama, in the Republic of Panama, through the Canal Zone, to the city of Colon, in the Republic of Panama, for the deaths of the plaintiffs' decedents alleged to be caused by the negligence of the defendant on May 20, 1918, near Gamboa, in the Canal Zone, and in what is known as the Gamboa wreck.

In the Castilla case, No. 292, it is alleged in the complaint that the plaintiff is *feme sole*, of lawful age, a resident of the city of Panama, Republic of Panama, and that on the 20th day of May, 1919, she was the mother of one Lorenzo Ferrero, jr., a minor male child, 6 years of age, the natural son of plaintiff by her common law husband, Lorenzo Ferrero, sr., deceased, the said child being the only son of plaintiff and plaintiff the only surviving heir at law of the said Lorenzo Ferrero, jr., and the defendant is a corporation and doing business under the laws of the State of New York, United States of America, is a common carrier within the Panama Canal Zone, and was such common carrier and was operating said railroad on the 20th day of May, 1918; that on said 20th day of May, 1918, plaintiff purchased from the defendant at defendant's railroad station in the city of Panama, Republic of Panama, a certain railroad ticket by the terms of which the defendant company promised and agreed with the plaintiff in consideration of the payment unto the defendant of the purchase price of said ticket, to safely carry said plaintiff's minor son, Lorenzo Ferrero, jr., as a passenger in a second-class coach of one of the defendant's regular passenger trains, from the city of Panama, through and across the Canal Zone, to the city or town of Gatun, Canal Zone; and that said minor son, under the care and custody of a nurse, became a passenger in said defendant's railroad

train, * * * etc., and that while plaintiff's said minor son was such passenger on such coach or car of said train, the defendant company and its servants and employees, so negligently and unskillfully conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully constructed and in using improper equipment, as to cause derailment of said train upon which said plaintiff's minor son was riding as a passenger, at or near a place known as Gamboa, within the Canal Zone, and as a result of said negligence and derailment of defendant's train the coach or car wherein plaintiff's said minor son was riding as a passenger was suddenly and violently thrown from the tracks while said train was being operated at a great and dangerous rate of speed upon a down grade and at a curve; and by being so thrown from the tracks the said car was overturned, broken up, and wrecked, and the said Lorenzo Ferrero, jr., minor son of the plaintiff, was then and thereupon immediately killed.

And plaintiff further alleged that she was damaged by reason of her son's death in the sum of twenty-five thousand dollars (\$25,000), and prayed judgment.

To this complaint the defendant demurred on the grounds: First because the cause of action, if any existed, did not survive in favor of the plaintiff herein, the deceased being the illegitimate child of the plaintiff; second, because the plaintiff herein would not have been entitled to the earnings of the deceased minor during his minority, under the laws of the Canal Zone; and third, because the plaintiff would not have been entitled to any of the earnings of the said minor after he attained his majority, under the laws of the Canal Zone.

In the case of James Rock *vs.* the Panama Railroad Company, No. 310, the plaintiff alleges in his complaint that he is a resident of Gatun, Canal Zone, and is the only surviving heir at law of Rachael Rock, plaintiff's deceased wife, and plaintiff brings this action for himself and in his capacity as heir of the said Rachael Rock, deceased, and that the defendant is a corporation, organized and existing under and by virtue of the laws of the State of New York, United States of America, is a common carrier by railroad within the Canal Zone, and at all times hereinafter mentioned defendant was such common carrier of persons and property for hire, and was such common carrier and was operating said railroad on the 20th day of May, 1918.

Plaintiff further alleges that on the 20th day of May, 1918, and a long time prior thereto, he was the lawful husband of Rachael Rock, deceased, and living with his wife in the town of Gatun, and that he is the legal heir and her only surviving heir at law.

That on the 20th day of May, 1918, said Rachael Rock, for the usual customary cash consideration which was then and there paid

by the said plaintiff's decedent unto the defendant, she purchased from the defendant a certain railroad ticket, by the terms of which defendant promised and agreed to undertake to safely carry plaintiff's decedent as passenger in a second-class coach or car of one of the defendant's passenger trains, from the city of Panama, Republic of Panama, through and across the Canal Zone to the town of Gatun, Canal Zone, * * * etc., and that plaintiff's said decedent did then and there go aboard and enter said second-class coach or car of said defendant's train and became a passenger thereon, etc.

That while plaintiff's decedent was such passenger, the defendant and its servants and employees so negligently conducted itself and themselves in the operation and management of said train of cars, and in having its tracks so unskillfully and improperly constructed, etc., as to cause the derailment of said train of cars at or near a place known as Gamboa, in the Canal Zone, and that the coach or car wherein said plaintiff's decedent was riding as a passenger, was suddenly and violently thrown from the tracks while said train was being operated by the defendant at a great and dangerous rate of speed upon a down grade and at a curve, and that said car was overthrown and whereby said Rachael Rock, plaintiff's decedent, received great and severe bodily injuries from which she suffered great and severe bodily physical pain, and mental anguish, and from which said injuries, received as aforesaid, died on the said 20th day of May, 1918, etc., and

That plaintiff suffered damages in the sum of fifteen thousand dollars (\$15,000), for which he prays judgment.

To this complaint the defendant filed a demurrer on the ground that under the substantive law of the Canal Zone there is no statute or law which confers an action for damages for wrongful death, nor does any statute or law specify the party who would be authorized to sue and recover therefor.

The demurrer to each of these complaints raises the question of the right of the plaintiffs to recover under any laws of the Canal Zone. The parties agreed that the demurrers to both these cases should be argued together at the same time, and that the Court's ruling on the demurrers, which the Court announced would be in writing, shall be made at the same time and filed in each case.

Oral argument was held and briefs filed by counsel for both plaintiffs and defendant.

Plaintiff concedes that these are not actions based upon the theory of the survival of action of a deceased person, and that plaintiffs are not bringing suits for any sufferings or injuries to the deceased persons, Rachael Rock and Lorenzo Ferrero, jr., and plaintiffs further admit that any right of action that Rachael Rock or Lorenzo Ferrero,

jr., and against the Panama Railroad Company for their sufferings, mental anguish, or mutilation caused by the negligence of said railroad company, dies with them; but plaintiffs contend that under the laws of the Canal Zone, that when the defendant company by its negligence deprived James Rock, one of the plaintiffs, of his wife, he James Rock, was materially damaged by the Panama Railroad Company, and a new right of action arose in favor of him, not to sue on account of any action which his deceased wife had against the company for her injury and damage, but to sue for his direct damage in being deprived by the said company through the company's negligence, of the services and companionship of his wife; and plaintiffs further contend that when the said company through its negligence deprived Camila Castilla of her son, a right of action arose against the company in favor of her, not on account of suffering and injuries of her deceased son, but on account of her direct loss of being deprived of the companionship, right of services, and expectancy of support of her, of which she had been wrongfully deprived by the said company.

Counsel for plaintiffs concedes that if plaintiffs have any right of action at all, it must be by virtue of section 2341 of the Civil Code of the Canal Zone, which reads as follows:

He who has been guilty of an offense or fault which has caused another damage, is obliged to repair it.

Some of the questions raised by the demurrer in this case are *res nova* in this court as now constituted. Congress has not yet seen fit to give to the Canal Zone a complete and efficient code of laws, and this court is constantly confronted with indefinite, uncertain, ancient, and incomplete laws to construe. For more than 100 years the territory of which the Canal Zone strip forms a part has been governed by the Napoleonic Code. The Civil Code now in effect in the Canal Zone was enacted by the Congress of Colombia in 1873, and was made applicable to the Republic of Panama in 1887. By Act of Congress, approved April 28, 1904, the President of the United States was granted power, until the expiration of the 58th Congress, to make all rules and regulations necessary for the government of the Canal Zone. Under the authority thus given him, on April 28, 1904, the President addressed a letter to the Secretary of War, by the terms of which the direction of the Canal affairs was placed under the control of that official, and in said letter the President directed as follows:

The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone, and in other places on the Isthmus, over which the United States has jurisdiction, until altered or annulled by the said Commission, but there are certain great principles of govern-

ment which have been made the basis of our existence as a nation which we deem essential to the rule of law and the maintenance of order, and which shall have force in said Zone.

At this time the Canal Zone was inhabited by Panamanians who were familiar with the Napoleonic Code adopted by Colombia and Panama. But in 1912 the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and took possession of all the land, and the Panamanians were required to remove from the Canal Zone, and from that time to the present the Canal Zone has been inhabited and peopled largely by people who come from the United States, and who were and are unacquainted with the code as adopted by Colombia, and extended to Panama, and thereafter retained on the Canal Zone as heretofore stated; and this court is required to interpret these ancient laws and apply them to a people who are unacquainted with them, and who have been educated to a more modern system of laws as prevails in the States.

We are not without some assistance as to the manner of construing the uncertain, indefinite, and incomplete laws of the Canal Zone. The Supreme Court of the United States has in a measure marked the manner of the construction of such laws in the case of the Panama Railroad Company *vs.* Theo. Bosse, decided March 3, 1919. This was an action commenced in the United States District Court of the Canal Zone for personal injuries and consequent suffering caused by the railroad company's chauffeur negligently driving a motor omnibus in such a manner as to injure the defendant. The railroad company demurred to the complaint, and one of the specifications of the demurrer raised the right of the plaintiff to recover damages for pain and suffering. This involved the construction of the said section 2341: "He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it without prejudice to the principal penalty which the law imposes." In this decision the Supreme Court reviews the laws in general of the Canal Zone as follows: "By the Act of Congress of April 28, 1904, c. 1758; Section 2, 33 Stat. 429; temporary powers of government of the Canal Zone were vested in such persons and were to be exercised in such manner as the President should direct. An Executive Order of the President, addressed to the Secretary of War on March 8, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contains this passage; 'The laws of the land with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone, * * * until altered or annulled by the said

Commission.' With power to the Commission to legislate, subject to approval by the Secretary." This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and published by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, c. 390, section 2, 378 Stat., 560, 561, "All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone, the construction of the Panama Canal, are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

On December 5, 1912, acting under authority of the before-mentioned Act of August 24, 1912, section 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and directed the Chairman of the Isthmian Commission to take possession of it with provision for the extinguishment of all adverse claims and titles. The Canal Zone is now peopled only by the employees of the Canal, the Panama Railroad, steamship lines, and oil companies who are permitted to do business in the Zone under license. The Supreme Court says further: "If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case, if the Zone had remained within the jurisdiction of Colombia, it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the revocation of that order by the Act of August 24, 1912, no more vested upon the Zone a specific interpretation of the former Civil Code than does the statute adopting the common law vest upon a territory a specific doctrine of the English courts.

* * * * *

In the matter of the personal relations and duties of the kind now before us, the supposed interpretation would not be a law with which the present inhabitants are familiar, in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men."

The Supreme Court then proceeds to show that even the Supreme Court of the Canal Zone, which has since been abolished, announced that it would look to the common law in the construction of the Colombian statutes. Again the Court says, "It is not necessary to dwell upon the drift toward the common-law doctrine noticeable in some civil law jurisdiction at least, but to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common law ruling."

In the opinion the Court said: "We are satisfied that it would be a sacrifice of substance to form if we should reverse this, the principle of which has been accepted by all judges accustomed to deal with the locality in deference to the possibility that a different interpretation might have been reached had the Civil Code continued to regulate a native population and to be construed by native courts."

In closing the opinion, the Supreme Court said: "The physical pain being substantially an appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native courts, is properly allowed here," and affirmed the judgment of the United States District Court. It would seem from this decision the Supreme Court is of an opinion that an exotic interpretation of the Civil Code of the Canal Zone would be an imposition of rule opposed to the common understanding of men.

Section 2341 of the Civil Code of the Canal Zone is almost in the exact language of the French law, or code of Napoleon, from which the Civil Code of the Canal Zone is taken. The words of the Civil Code of Cuba, also based upon the same basic law, are as follows:

He who, through act or omission, causes damage to another, through intervening fault or negligence, is obliged to repair the damage caused. Civil Code of Cuba, Article 1902.

And the Supreme Court of Cuba, a court composed of Spanish-speaking lawyers, working in Spanish and under the principles of Spanish law, construed the statute as above set out in a case brought to ascertain if a widow had a right of action against a company for the negligent killing of her husband by that company, and under that statute the Court allowed her to recover for her, and not her husband's injuries, the Court saying:

A sentence which, recognizing as the cause of death of an individual, the negligence of an employee of an enterprise or company, condemns that enterprise or company to the payment of damages is in perfect accord with the precepts of Articles 1902 and 1903 of the Civil Code. Theofila Bonza, widow of Formoso *vs.* Francisco Unilo Terry. Sentence No. 63 of November 11, 1903: Sup. Ct. of Rep. of Cuba.

In the laws of the Republic of Panama there is a statute almost verbatim with article 2341 of the Canal Zone, and under that statute in 1918, a suit was brought in the courts of Panama City against the street car company by a woman, Emilia Orozzo, for the negligent killing of her son, Elisco Masa, and the Supreme Court of Panama allowed her to recover against the company on the theory that she had been materially damaged by the killing of her son. In other words, the Court held that under the statute (which is practically section 2341 of the Canal Zone), the street car company had been guilty of an offense or fault which had caused damage to this mother,

and therefore obliged to make restitution to the mother for the damage done to her by the street car company's neglect.

It must be seen that in Cuba and Panama, the very countries who formulated and gave to us the Civil Code, article 2341 is interpreted to mean just what it says, and any act of man that causes damage to another creates and imposes liability and obligation that the trespasser must answer in damages with whomsoever may have been injured by the negligent act.

Prior to the time that the Supreme Court of the Canal Zone was abolished, that court speaking through Justice Collins, in the case of *Chong vs. Chong* (2 C. Z. Sup. Ct. Rep., 25), said:

No greater system of substantive law has been prepared by man than the Spanish Code; but it must always be carried in mind by reason of its universality it must at times lack in specificity, and that into its universality must be breathed the spirit of liberal construction.

It was upon the doctrine of this case that the Supreme Court mainly based its decision in *Fitzpatrick vs. Panama Railroad Company* (2 C. Z. Supt. Ct. Rep., 111), and that case has been cited with approval by the Supreme Court of the United States in the case of the Panama Railroad Company, plaintiff in error, *vs. Theo. Bosse*, decided March 3, 1919.

The Civil Code of Porto Rico, article 1902, provides: "A person who by an act of omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

In the United States District Court for the District of Porto Rico, an action was brought by *Teresa Borrero vs. Compania Anonyma de la Luz Electrica de Ponce*, for damages for the death of her son, under said section 1902 of the Civil Code of Porto Rico, Hon. Wm. H. Holt, who was United States District Judge for Porto Rico on January 14, 1903, when said case was decided by the court, delivered an opinion, being rather brief but very comprehensive, I thought it advisable to set out this opinion in full, which is as follows:

This is an action by the plaintiff, *Teresa Borrero*, who is a widow, for damages for the death of her son, who was not in the employ of the defendant company, through its alleged negligence. It is averred that the defendant was in control of the electric wires in the streets of Ponce, used for lighting the city; that it negligently permitted a wire to hang loose, the end of it nearly touching the sidewalk, and that her son, coming in contact with it, was killed almost instantly. The case is submitted upon a general demurrer to the declaration. The question is presented whether, under the existing law in Porto Rico, an action can be maintained for the death of a person through negligence. The declaration does not aver the age of the deceased; but under the law of Porto Rico children are bound to support the parent without regard to their age.

By the common law, no civil action lies for an injury which results in death. *Actio Personalis moritur cum persona*. Whatever dispute may have once existed over it, this is to be regarded as the rule definitely settled by the Supreme Court of the United States. *Mobile L. Ins. Co. vs. Brame*, 95 U. S., 756, 24 L. Ed., 582.

The rule was again stated in the case of *The Harrisburg* (*The Harrisburg vs. Richards*) 119 U. S., 199, 30 L. Ed., 358, 7 Sup. Ct. Rep., 140, and in which it was held that no such action lies in a United States court under the general maritime law. Where the common law prevails, and the right to sue in case of death exists, it is solely by virtue of statute. In England the act of Parliament of 1846, commonly known as "Lord Campbell's Act," first gave the right; and it has served as a model for subsequent legislation on this subject. In most, if not all, of the States of the United States this right has been given by statute. The act, however, creating civil government in Porto Rico, of April 12th, 1900, provided that the existing laws of Porto Rico should continue in force except as therein altered, and as altered by military orders in force May 1st, 1900, and so far as they were not inconsistent with the statutory laws of the United States locally applicable. The question is, therefore, to be considered with a view to the mixed system of law prevailing here. The question is *res nova* in this court. The civil law, so far as it existed in Porto Rico, has, as above modified, been continued in force.

Writers on international law, especially Grotius, recognized liability in case of death by negligence, to make reparation to those whom the deceased was bound in duty to maintain. Pufendorf and other writers upon natural law maintain the same; and it is said that natural equity and the general principles of law favor such action. Domat, in his work on Civil Law, recognizes this as the true rule. The opinion of the Supreme Court of the United States in the case of *The Harrisburg*, recites that it is said that by the civil law such action may be maintained, but that this is denied by the Supreme Court of Louisiana. There is no question but what under the French law it lies. Whatever the rule may be, however, the law of Porto Rico as derived from Spain must be decisive of the question in this jurisdiction. The local legislature has not provided for the case.

The Civil Code of Porto Rico, article 1902, provides: "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done." There is no express provision as to the right to sue in case of death. Under the practice formerly existing in Porto Rico, in a proper case the law provided for, not only criminal proceedings, but for indemnification on account of the unlawful act to those entitled to it, all in the same proceedings; but those entitled to the civil indemnity could decline to proceed with the criminal action, and yet sue for civil liability. Article 16 of the Penal Code provided that one liable for a misdemeanor was also liable civilly. Both the penal and civil liability could be determined in the same proceedings; and article 123 provided: "The action to demand restitution, reparation, or indemnification is also transmitted to the heirs of the person injured." The Supreme Court of Spain in the case of Juana Alonzo Celada against Manuel Chacon and Candido Lara in December, 1894, held that under the then-existing Spanish law the action could be maintained. This court was the supreme tribunal as to the construction of Spanish law and the civil law so far as existing and applicable to Spanish possessions. Regard should be had, in my opinion, to its authority, and in view of this provision of the law and of this ruling, the demurrer herein is overruled.

On January 16, 1903, in the same court, in the case of Leocadio Torres, etc., *vs.* Ponce Railway & Light Company, Porto Rico Federal Reports, Vol. I, pp. 476-477, the court affirmed the opinion in the Borrero case. In the Torres case, the brother and sister sued for damages for injury to their brother, resulting in death, through the alleged negligence of the defendant in the operation of its electric street cars upon a street in the city of Ponce; they alleging deceased

dies intestate, leaving no widow or issue; that plaintiffs are his only heirs, and that they were dependent on him for support; and that he always did support them; and that they are now destitute.

A demurrer was filed to the complaint, as there was in the Borrero case, on the ground that plaintiffs had no right to sue or maintain an action; but between the dates in the decision in the Borrero case and the Torres case, there had been adopted an amended Civil Code of Porto Rico, and the defendant urged that if the correct rule was announced in the Borrero case that it was otherwise under the present law, but the Court in rendering his opinion held that article 1803 of the amended code was the same as article 1902, of the original Civil Code, and the Court further stated that there had been no such change of the local law as to render inapplicable the construction given by the Supreme Court of Spain to the existing civil law applicable to Porto Rico, and which law, with certain qualifications unnecessary to enumerate, had been continued in force by the act of Congress of April 12, 1900.

Again, in the United States District Court in and for Porto Rico, the Hon. Bernard S. Rodey, District Judge, a decision was rendered December 3, 1908, in the case of Belen Requena de Molina *vs.* San Juan Light & Transit Company (Porto Rico Federal Reports, Vol. IV, pp. 356-361); this was an action filed under section 1803 of the Civil Code of Porto Rico of the year 1902, which reads: "A person who, by an act of omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done." The court said: "This is a plain action for damages, brought by the plaintiff as the widow of her late husband, Francisco Molina, who, she alleges, met his death (on the night of the first or the morning of the second of April, 1908), through the negligence of the defendant." The decedent's death was brought about by an electric shock received while he was in a dining room in the city of San Juan, and in this case the court sustained a verdict for the plaintiff in the sum of \$17,500. This case was appealed to the Supreme Court of the United States, and reported in 224 U. S., pp. 680-681, the Supreme Court affirming the decision of the U. S. District Court of Porto Rico.

If the plaintiffs herein, or either of them, have a right of action, it must rest upon article 2341 of the Civil Code of Panama, which reads as follows: "He who shall have been guilty of an offense or fault which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed."

Were it not for the fact that the courts in Spanish countries in construing this statute or statutes almost identical with it, have held that such recoveries as these in question could be had, it would seem to me

at first impression doubtful whether this article creates a right of action in heirs or dependents for the wrongful death of a person. It is generally considered that in common law, and particularly under civil law, a right of action for the death of a person does not survive.

As was said in the Supreme Court of Louisiana:

Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man can not be made the subject of valuation, and under the domination of that dogmatic utterance made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for short lived pains, and refusing them for a life-long sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort, and even the necessary stays of life. *VanAmburg vs. Pittsburg S. & P. R. Company*, 37 La. Ann., 650. The same doctrine prevails under the general maritime law where death is the result of negligence. "*The Harrisburg*," 119 U. S., 199.

Construing article 2341 of the Civil Code in accordance with the principles of common law, or even of the civil law, it would seem that a right of action is not created by it in either of the plaintiffs. The common law rule, however, has long been abrogated by statute both in England and America, and it would seem reasonable to recognize that universal change and to interpret article 2341 not in accordance with the ancient common law doctrine, but rather in the spirit and according to the principles of present day rule, even though that rule be of legislative enactment.

This construction, apparently, had been followed by our neighboring courts as heretofore set out. In view of these cases, and in accordance with reason, I believe I am justified in holding that recovery may be had under the code by an heir or legal dependant for a wrongful death.

Therefore, I overrule the demurrer as to this point.

There is another question involved which is worth while considering on the question of the right to recover in this case, that is the rule when the injury consists of a breach of contract. In the cases at bar, contracts were entered into between the decedent in the Rock case and the defendant, and the mother of the decedent of the Castillo case and the defendant to transport the deceased to certain points safely. It has been held that torts that spring from contracts that consist in mere omission of a contract duty are strongly distinguished from wrongs which are merely trespasses upon the rights of the master of the person in the servants. It has been held that where passengers purchase and secure tickets to make journeys on railways, and during such journey receive injuries from the negligence of the railroad company, that the action in substance is on the contract and the damage resulting by reason of the breach of contract, and whatever damage is sustained are the natural result of the breach of contract. For decisions along this line see *Gulf, Colorado & Santa Fe R. R. Co. vs. W. T. Beal and wife*, reported in 41 L. R. A. page 807, and note 4 on page 815.

Another specification in the demurrer in the Castillo case raises the question that the plaintiff is not entitled to the earnings of the deceased minor during his minority under the laws of the Canal Zone, and that plaintiff would not be entitled to any of the earnings of the minor after he attained his majority under the laws of the Canal Zone, and for these reasons the plaintiff can not recover.

We will first look to the laws of the Canal Zone and see whether or not these specifications of the demurrer are well taken. Section 411 of the Civil Code, at page 102, provides that "support is due:

1. Spouses.
2. Legitimate decedents.
3. Legitimate ascendants.
4. A woman divorced who did not give cause therefor.
5. The natural children, and their legitimate posterity.
6. THE NATURAL PARENTS."

Article 77 of law 153 of 1887, which is a supplement and amendment to the Civil Code, and which may be found at page 564 of the Code, reads as follows: "An illegitimate father suing for support in such capacity shall not be heard. But a mother who demands support of an illegitimate child shall be heard." Under the common law parents were always entitled to the custody and services of the child until they should have reached their majority. See Cooley on Torts, 2 Ed., p. 39.

Southerland on Damages, states as follows: "In the case of the death of a minor child, the pecuniary benefit its parents had a reasonable expectation of receiving from him, had he lived, is the measure of damages; and in addition thereto, the cost of medical aid and other like expenses necessarily incurred, were held recoverable, but those were not items of pecuniary injury resulting from the death." 4 Southerland on Damages, p. 3736, and citing authorities. Again, that authority at page 3738 said: "The principal limit of damage to a parent as the result of the death of a child is the loss of its services during minority, considering the cost of support and maintenance during the helpless part of its life.

It has also been held in a number of States that "A parent seeking to recover damages for the negligent killing of his child is not limited to the present loss of money, but may be allowed prospective advantages of a pecuniary nature." See *Vicksburg vs. McLain*, 67 Miss., 4; *Penna. R. R. Co. vs. Keller*, 67 Pa., 304; *Tilly vs. Hudson R. Co.*, 24 N. Y., 473.

Again in the Supreme Court of Indiana, in the case of *Mayhew vs. Burns*, 1 N. W., 577; 103 Ind., 328, set the rule that "The reasonable expectation of pecuniary advantage by the relation of parent and child continuing may be taken into account." This is supported by the Supreme Court of Pennsylvania, in *Penna. R. R. Co. vs. Adams*, 55 Pa., 499; and many other cases.

In the case of *State vs. B. & O. R. Co.*, 24 Md., 107, it was held, "A father may recover for loss of services of a minor child up to the termination of his minority."

In the case of *Chicago & A. R. Co. vs. Becker*, 84 Ill., the parents were allowed to recover the sum of \$2,000 for the death of a 6-year old minor child; and in *Houghkirk. vs. D. & H. Canal Co.*, 26 Hun., 407, a recovery of \$5,000 was allowed to stand by the Supreme Court for the death of a 6-year old child.

The additional question is raised in the Castilla case as to the mother having a right to recover for the death of her child on the ground, as stated in the demurrer, that the child is an illegitimate one; but the complaint in this case alleges the child to be a natural son of plaintiff by her common law husband, Lorenzo Ferrero, Sr., deceased; the said child being the only son of plaintiff, and plaintiff is now the only surviving heir at law of the said Lorenzo Ferrero, Jr., and of course, the demurrer admits the truth of the allegations in the complaint, and I must rule as to the sufficiency of the complaint on the demurrer.

However, in the argument it was contended by the defense that this was an illegitimate child; that the father and mother were never married; but both parties admit that the father and mother lived together as husband and wife until the death of the father. I might add here that a very large per cent of men and women in Panama live together as husband and wife without a ceremony of marriage, and raise families of children, and the practice is so prevalent and so extensive that a large per cent of the people in Panama look upon this manner of living together as husband and wife as legal and proper. But assuming that common law marriages are not legal in Panama and that the deceased child was born to the plaintiff and the man with whom she lived when there was no formality of marriage ceremony, will that defeat her recovery in this case?

Under the title of Additions to an Amendment of the Civil Code, at page 545 of the Civil Code, we find article 7, which reads as follows: "The natural children are called those begotten out of wedlock, and of persons who could marry each other at the time of the conception; those children who have been acknowledged by their father or mother, or by both, in a public instrument or testamentary act, or in accordance with article 368 of the Code." Notwithstanding the provision of the preceding paragraphs natural children shall be considered, as to the mother, and for all civil effects, those conceived by a woman who could freely marry at the time of the conception."

Article 368 referred to in said article 7, are in the following words: "When a father shall acknowledge a natural child in the record of birth, it shall be sufficient that he shall sign the respective record as evidence of acknowledgement."

Article 77 of the amended Code, found on page 564, are in these words: "An illegitimate father suing for support in such capacity shall not be heard. But a mother who demands support of the illegitimate child, shall be heard, unless the latter shall have been abandoned by her in infancy."

The theory of our decisions is that the right to recover damages for the death of a human being is purely statutory, and the statute giving such right must be strictly construed, and it is a rule of construction that *prima facie*, the word "child" and "children" used either in statute of law, means legitimate child or children." (Alice McDonaIs *vs.* So. R. R. 757 S. C., 352; 2 L. R. A., N. S., 640 and Note.)

It is usually held, therefore, that no action can be maintained for the death of an illegitimate child under the statute. (Ala. & V. R. Co. *vs.* Wilgins (Miss)., 51 L. R. A., 826; 28 So., 853.)

So the right of a mother to recover for the negligent killing of an illegitimate child under the statute giving a right of action for the negligent killing of a child is denied in Georgia, notwithstanding the fact that the statutes of the State provide that illegitimate children may inherit from the mother, and their mother from them in the same manner as if legitimate. (Robinson *vs.* R. & B. Co., 117 Ga., 168; 60 L. R. A., 555; 43 S. E., 452.)

In Indiana it has been held that the father of an illegitimate child has no right of action for the child's death under a statute giving the father the right of action for the death of a child although the mother is dead, and the child has been acknowledged by the father, and had no guardian or next of kin except him. (McDonald *vs.* P. C. C. & St. L. R. R. Co., 144 Ind., 459; 32 L. R. A. 309; 43 N. E., 447.)

Applying the same rule to actions for the benefit of an illegitimate child, the right to maintain an action under Lord Campbell's Act for the death of a woman for the benefit of her illegitimate child was denied in an English case on the ground that the word "child" in an act of Parliament always applies exclusively to a legitimate child. So the right of an illegitimate child to recover under a statute giving a right of action to one dependent upon a person whose death was caused by intoxicating liquor illegally furnished, is denied in Good *vs.* Towns, 56 Vt., 410. And it has been held that an illegitimate half sister can not maintain an action under a statute entitling a sister or brother to sue for the death of a sister or brother. (Ill. C. R. Company *vs.* Johnson (Miss); 51 L. R. A., 837; 28 S., 753.)

It must be noted, however, that these decisions are not so much based upon any principle of law as they are upon a construction of the meaning of the word "child" as used in the statute creating the right of action. As was said by Chandler, Judge of the Supreme Court of Georgia, in concurring opinion: "I concur in the judgment rendered

in this case because under the previous rulings of this court it must be binding upon us. If it were an original question, I would never agree to a judgment which holds that for the death of a child, the doubly unfortunate mother of a child, whose sole parent she is and upon whom she is dependent—this dependency probably due to the fact of its miserable birth—can not recover for its homicide, although our lawmakers have declared that “a mother can recover for the homicide of a child upon whom she is dependent or who contributes toward her support.’ ”

Where by statute the mother and child are permitted to inherit from each other, a right of dependence is given to the one against the other, and it would seem the right of recovery for death would continue as a natural consequence. It was stated, however, by the Supreme Court of Georgia in this connection “while it is evidently true that the statute of illegitimates under our law is greatly superior to what it was under the common law, yet it can not be said that they have been legitimized, at least for all purposes, and placed upon the same footing in all respects as children born of lawful wedlock; and in view of the decision of this court to the statute giving the right of action for homicide should be strictly constructed; the word “child” used in the statute, *prima facie* means a legitimate child, we are constrained to hold that the mother of an illegitimate child has no right of action for his wrongful or negligent homicide.”

It may be noted that there are some decisions which hold that where the mother and child are permitted by statute to inherit from each other, recovery may be had by the mother for the wrongful death of her child.

Two of the cases, however, referred to in support of this more liberal construction, are the Security Title Co. *vs.* Chicago St. Ry. Co., 91 Ill. Apel., 332; and Mash *vs.* Wood Co., 122 No., 225; 25 S. W., 179.

In the Missouri case it seems to have been held that since by statute, an illegitimate child was made capable of inheriting from its mother and the mother from the child, there could be no good reason why a mother should not be permitted to recover for the negligent killing of her illegitimate child under the statute permitting the father or mother to recover for the negligent killing of a child.

It might be answered that the reason for a contrary ruling, as pointed out by the other decisions, is that the word “child” when used in a statute is universally construed to mean a legitimate child. Upon this principle of construction is based the settled rule that under the statutes in the various States and of England, a mother can not recover for the death of an illegitimate child, though under the general statutes of inheritance, she may inherit from the child and the child from her.

The American rulings, however, are not conclusive in the case pending before me. The plaintiff herein is not proceeding under a statute corresponding to "Lord Campbell's Act," and the construction of the term "child" as used in such statutes need not determine my decision as it determined the decisions in the cases cited. Article 1239 and 1240 of the Civil Code of the Canal Zone, designated *natural* parents as legal heirs; article 411 of the Code states that support is due to natural parents, and the Civil Code further provides that the mother may demand support from the illegitimate child. (Article 77, page 564.) If, under article 2341, a right of action for injury causing death survives, the decisions I have stated would not necessarily preclude me from holding such right of action survives for the benefit of the heirs and those legally entitled to support. The general force of American decisions is merely to hold that where the word "child" is used in a statute, a legitimate child is meant, and that, broadly speaking, the rights and privileges that are given by law to parents and children ordinarily do not extend to illegitimate children or natural parents. But as to who has the right to maintain an action for a minor child, if one can be maintained, the general trend of authorities is that while either the father or mother is alive, unless they have relinquished their right, respectively, to the services of the child, by emancipation or otherwise, and abdicated their duty to furnish it support, no one else is entitled to maintain an action for loss of its services during minority, because the injury is to the person entitled to the child's services and not to the minor's estate.

I think a more liberal rule is now being established in the States in favor of a mother recovering for the death of her illegitimate child. In the case of *Thompson vs. D. L. & W. Ry. Co.* (1910), 41 Pa., Super. Ct., 617, it is held that the mother of an illegitimate child is entitled to recover for the wrongful death where by statute the child was *legitimate as to her*. In the case of *L. T. Dickason Coal Co. vs. Liddill* (1911), 49 Ind. Apel., 40); 94 N. E., 411, it was held that under a statute authorizing a recovery for the next of kin a recovery for the negligent killing of an illegitimate may be had for the benefit of the mother and brothers and sisters of the half blood where, by the statute of distribution, they are next of kin. In the case of *Andrezeyejewski vs. N. W. Fuel Co.* (1914), 158 Wis., 170, 148 N. W., 37, it is held that, under a statute authorizing recovery for the benefit of the lineal ancestors where there are no lineal descendants of the deceased, a mother is entitled to recovery for the pecuniary loss suffered by the killing of an illegitimate son 38 years old who left surviving him no wife or lineal descendents. In the case of *the Security Title & T. Co. vs. W. Chicago St. R. Co.* (1900), 91 Ill. App., 332, it is held that a mother of an illegitimate child is beneficiary in an act for the negligent killing of the child

under statute providing that the estate of an illegitimate person shall descend to the widow or the surviving husband and children, the same as the estate of other persons. In a large number of States it has been held that under statutes embodying in principle "Lord Campbell's Act," giving right of recovery for the benefit of the next of kin, or heirs or parents of persons negligently killed, a mother may recover for the negligent killing of an illegitimate child. *Hadley vs. Tallahassee* (1914), 67 Fla., 436; 65 So., 545. *Southern R. Co. vs. Hawkins* (1910), 35 App. D. C., 133; 21 Ann. Cas., 928. *Security Title & T. Co. vs. W. Chicago Street R. Co.* (1900), 91 Ill. App., 332. *L. T. Dickason Coal Co. vs. Liddill* (1911), 49 Ind. App., 40; 94 N. E., 411. *Marshall vs. Wabash R. Co.* (1894), 120 Mo., 275; 25 S. W., 179. *Muhl vs. Mich. So. R. Co.* (1859), 10 Ohio St., 272. *Croft vs. Southern Cotton Oil Co.* (1909), 83 S. C., 232; 65 S. E., 216. *Galveston H. & S. A. R. Co. vs. Walker* (1902), 48 Tex. Civ. App., 52; 106 S. W., 705. See also note in 2 L. R. A. (N. S.), 640. *L. T. Dickason Coal Co. vs. Liddill* (1911), L. R. A. 1916 E, 49 Ind. App., 40; 94 N. E., 411, and a number of other States which are in accord with these decisions; however, as here before stated, there is a conflict of decisions on this point. The Indiana case cited is based on a section of the code which provides that "a father (or, in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child." Under this section, it is held that the mother of an illegitimate child could maintain such an action, regardless of whether the father is living or not.

In the absence of some enactment corresponding to "Lord Campbell's Act," the cause of action in both of these cases would have to be based on article 2341 of the Civil Code. Guided by the Supreme Court of the United States in the case of the Panama Railroad Company *vs.* Theo. Bosse, decided March 3, 1919, I think I am justified in interpreting this article in accordance with the universal statutory laws of England and the United States, and hold that the cause of action survives; unrestricted by the limited meaning of the word "child" as used in the statute creating a right of action, I see no reason why I should not hold that the cause of action survives for the benefit of the legal heirs and those entitled under the Civil Code of the Canal Zone to legal support.

The question with me is an original one, and I believe I am justified in taking a position assumed in his concurring opinion by Chandler, Judge, in the Georgia case cited: "If it were an original question I would never agree to the judgment which holds that for the death of a child, the unfortunate mother of the child, whose sole parent she is and upon whom she is dependent, can not recover for its homicide, although our lawmakers have declared that a mother may recover for the homicide of a child upon whom she is dependent or who contributes toward her support."

Assuming that under the Civil Code of the Canal Zone a mother may recover for the death of a child, I believe I am justified in holding that a *natural* mother may recover for the death of her illegitimate child whose heir she is and from whom under the provisions of the Civil Code she is entitled to support, and therefore overrule the demurrer on this point.

AMERICAN TRADE DEVELOPING CO. *versus* THE TEXAS CO.

(District Court, Canal Zone, Balboa Division, December 1, 1919.)

Civil No. 350.

1. PRINCIPAL AND AGENT. AUTHORITY OF AGENT.

The authority of an agent to bind the principal may be either expressed or implied.

2. PRINCIPAL AND AGENT. AUTHORITY OF AGENT.

One who deals with an agent is put upon inquiry to determine the extent of the agent's authority, and assumes the risk of an agent's lack of authority to bind his principal in the transaction.

3. PRINCIPAL AND AGENT. AUTHORITY OF AGENT.

A principal is not bound by the unauthorized acts of his agent, but is bound by every act on his own part which gives his agent apparent authority upon which other persons rely. Such an agency may be shown by circumstantial evidence. The apparent authority of an agent is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. Where a principal has repeatedly recognized a number of similar acts by the agent he is estopped from denying the agency to the injury of an innocent third person.

4. PRINCIPAL AND AGENT. LIABILITY OF PRINCIPAL. CORPORATIONS.

Every act of the agent within the scope of the agent's authority or impliedly possessed by the agent binds the principal, and corporations are liable to the same extent as natural persons.

5. PRINCIPAL AND AGENT. AUTHORITY OF AGENT. PROOF.

The burden of proof is upon a person alleging a contract made with an agent to show the agent's authority or apparent authority.

6. CONTRACTS. LETTERS AND TELEGRAMS.

Parties may enter into a contract by agreeing to the terms thereof by means of letters or telegrams. When an offer is sent by letter or telegram, it has no force or effect until received by the person to whom the offer is made. When an offer is accepted, the acceptance takes effect as soon as the letter is deposited in the mail or a telegram deposited with the telegraph company.

7. EVIDENCE. BEST AND SECONDARY.

Before secondary evidence is admissible, there must be notice to the adverse party in whose possession the best evidence is, to produce the same at the time of trial. This may be effected by a pleading, or by an oral notice, or by

a written notice given within a reasonable time, but an exception to this rule seems to exist where the document which is the best evidence is in a foreign country.

[NOTE]. See 272 Fed., 670.

Attorneys for plaintiff, *Todd and MacIntyre*.

Attorneys for defendant, *Fabrega and Arias*.

HANAN, District Judge. This was an action brought by the plaintiff against the defendant in the Cristobal Division of the United States District Court in and for the Canal Zone, and by agreement of the parties the case was transferred to the Balboa Division for trial.

The plaintiff alleges in his amended complaint that it is a corporation duly organized and doing business in the Republic of Panama and in the Canal Zone, and the defendant is a corporation doing business in the Canal Zone, having property in the Cristobal Division of the Canal Zone, and official or business residence within the territorial limits of the Canal Zone, and at the time of the filing of the complaint represented by its agent, P. Van Wagner, at Mount Hope, Canal Zone, and that the plaintiff during the months of October and November, 1917, entered into contract with the defendant, its agent or agents in the Canal Zone, whereby the defendant agreed to sell and deliver to the plaintiff in the months of January and February, 1918, in the city of Panama, Republic of Panama, 5,000 cases of "Crystalite" kerosene in two 5-gallon tins each, at a price of \$1.40 United States currency, f. o. b. New Orleans, less 2 per cent cash discount; that the defendant agreed to accept said order in the manner and form as set forth in exhibits made a part of plaintiff's complaint; that the time in which defendant agreed to deliver said kerosene has long since elapsed, and that the defendant failed within the time and ever since that time to deliver the kerosene or any part thereof to the plaintiff as agreed, and that the plaintiff has always been ready and willing to accept and receive the same, and to pay for it at the price and upon the terms and conditions set forth in the agreement. The plaintiff further alleges by reason of the failure of the defendant to deliver the kerosene to the plaintiff in accordance with the agreement the plaintiff lost and was deprived of great gains and profits, and that at the time of the making of the contract with defendant, plaintiff was in position to readily dispose of the 5,000 cases of kerosene at a profit of more than \$3,500, and defendant was well aware at the time of entering into the contract of the existence of such contract made, or to be made and entered into, by third parties by the plaintiff, and failure of the defendant to perform its part of

the contract the plaintiff lost and was deprived of great gain and profit, wherefore plaintiff prays judgment for \$3,500 United States currency, and cost herein expended.

To this amended complaint the defendant answered in two paragraphs. The first paragraph is a general denial, and in the second paragraph the defendant attempts to show that the alleged agent of the defendant, C. F. Elder, had no authority to make or execute or deliver any contract binding the defendant in the manner set out in the complaint. No demurrer was filed to this second paragraph, but the plaintiff filed a reply to the second paragraph of answer by way of general denial.

On these issues the cause was submitted to the court without intervention of a jury. The alleged contract between plaintiff and defendant is based largely upon letters and cablegrams passing between the plaintiff company and the defendant company, including those between the plaintiff and the defendant company's agent, C. F. Elder, who at that time was stationed in a home and office furnished by the defendant company on the Canal Zone; and as to the agency of Elder of the defendant company the plaintiff relies upon letters passing between him and the defendant company, conversations had by the plaintiff company and said Elder, and conversations had by plaintiff with the home office of defendant company in New York City, and letters and cablegrams passing between the plaintiff company and the defendant company at its home office in New York, and the defendant company accepting of payments of money made by plaintiff company for oil purchased directly and through the said Elder as agent of the defendant company, and by the defendant company accepting of orders taken by said Elder of the plaintiff company and of various other parties in the Canal Zone, Panama, and elsewhere, and the defendant accepting of checks, drafts, and other payments made to the said Elder by the purchasers of the oil, for which Elder had received the orders for purchases. There are certain principles of law applying to principals and agents which are more or less involved in this case, and for the purpose of applying the evidence in the case to those principles of law the Court deems it advisable to now state certain of those principles of law:

If a person knowingly and voluntarily permits another to hold himself out to the world as his agent, he will be held to adopt his acts and be bound as principal to the person who gives credit to the one acting as such agent. *Swanell vs. Byers*, 123 Ill. App. 545.

If the principal knew that agent was acting as his agent and was buying and selling goods in his name and for his benefit, and voluntarily permitted him to do so, the principal is bound thereby whether the agent was in fact the agent at the time or not. *Swanell vs. Byers*, 123 Ill. App. 545.

And the proof of agency may be dispensed with where the person alleged to be the principal has by his actions or words influenced the conduct of others so that a wrong

would be done to those influenced if the alleged principal should be alleged to show a state of facts inconsistent with his actions and words. *Haubelt vs. Rea & Page Mill Co.*, 77 Mo. App. 672.

One who was dealt with an agent has the right to assume, if not otherwise informed, that the authority of the agent continues and revocation by the principal of the agent's authority will not effect the person so dealing with the agent, unless such person has notice of the revocation. *McNeilly vs. Cont. Life Ins. Co.*, 66 N. Y. 23.

One who deals with an agent is put upon notice as to the extent of the agent's authority and assumes the risk of the agent having authority to bind his principal in the transaction in which they are engaged; or if the principal has held out the agent as having authority to transact business or knowingly permitted the agent to so act, the agent will be conclusively presumed to have the authority whether it has been actually conferred upon him or not. *Muth vs. St. Louis Trust Co.*, 94 Mo. App. 94.

The principal is not bound by the unauthorized acts of the agent, yet he is bound by every act on his own part which gives his agent apparent authority upon which other persons rely to do the act, the validity of which may be in question. *Burton vs. Curyea*, 40 Ill. 320, 89 Am. Dec. 350.

The fact of agency may be proved by circumstantial evidence. *Martin vs. Hutton*, 36 L. R. A. (N. S.) 602, 90 Neb. 34.

The alleged agency need not necessarily be established by direct evidence, but may be shown by circumstances such as the relation of the parties to each other and their conduct with reference to the subject matter of the contract. *Linguist vs. Dickson*, 6 L. R. A. (N. S.) 729.

One who seeks to charge another with the act of an agent must prove that the agent acted within the scope of his authority, actual or apparent, or ratification or acquiescence in, or acceptance of the benefit of the act on the part of the employer. *Hall vs. Passaic Water Co.* (N. J. Er. & App.) 43 L. R. A. (N. S.); 83 N. J. L. 771.

A third person may recover from a principal on a contract made by the agent on proof of apparent authority in the latter within the scope of which the act in question is included. *Union, etc., Co. vs. Longpole Lumber Co.*, 41 L. R. A. 663 (N. S.), 70 W. Va. 558.

"Agency, or authority by estoppel" arises in those cases where the principal by his culpable negligence permits his agent by unquestioned course of dealings to exercise powers not granted to him, in consequence of which third persons dealing with the agent are in good faith justified in believing him to possess the powers exercised. *Dispatch Frt. Co. vs. Natl. Bank of Commerce*, 50 L. R. A. (N. S.) 74; 109 Minn. 44.

The "apparent authority" of an agent is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. *Id.*

"Express authority" of an agent is that which the principal directly grants to him; and this includes by implication, whether the agent be general or special, all such powers as are necessary and proper as a means of effectuating the purpose for which the agency was created. *Id.*

Where a person openly and notoriously exercises the functions of a particular agency of a corporation, he will be presumed to have sufficient authority from the corporation to so act. *Meecham on Agency*, Sections 84, 86, etc.

Whenever one has held out another as his agent authorized to act for him, or has knowingly and without design permitted such other person to act as his agent in a given capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other person was his agent authorized to act in that capacity; whether it be a single transaction or a series of transactions, his authority to act for him as regards third persons in that capacity will be presumed so far as may be necessary to protect the rights of third persons who rely thereon in

good faith in the exercise of reasonable prudence, and will not be permitted to deny that such other person was his agent authorized to do the act that he assumed to do, provided such act is within the real and apparent scope of the presumed authority. *Meecham on Agency, supra.*

One who by his conduct has led an innocent party to rely upon the appearance of another authorized to act for him, will not be held to deny the agency to that party's prejudice, and in many cases the existence of an agency is implied or presumed from the words or conduct of the parties. *Meecham on Agency, supra.*

The relation of principal and agent does not depend upon express appointment and acceptance thereof, but it may be implied from the words and conduct of the parties and the circumstances of the case. *Hill vs. Helton*, 80 Ala. 528, 1 So. 340; *Anglo-Californian Bank vs. Cerf*, 147 Cal. 393, 81 Pac. 1081; *Long vs. Colburn*, 11 Mass. 97, 6 Am. Dec. 160; *Johnson vs. Hurley*, 115 Mo. 513, 22 S. W. 492.

The agent by implied authority being an actual agent, the principal is liable for his acts the same as though the authority had been expressed. *Hamm vs. Drew*, 8 Texas, 77, 18 S. W. 434.

Agency in fact as distinguished by agency by estoppel may be implied where one person by his conduct holds out another as his agent, or thereby invests him with that apparent or ostensible authority as agent. *Matter vs. Zinn*, 99 Hunn. (U. S.) 127, 35 N. Y. Suppl. 645.

So an actual agency may be implied from habit and course of dealing between the parties. *Gibson vs. Snow Hdwe. Co.*, 94 Ala. 346, 10 So. 304.

And authority may be implied from the acquiescence of the alleged principal in acts done in his behalf by the alleged agent, especially if the agent had repeatedly been permitted to perform acts like the one in question. *Pratt vs. Putnam*, 13 Mass. 361; *Haubel vs. Rea etc. Mill Co.* 77 Mo. App. 672; *Olcott vs. Tioga R. Co.* 27 N. Y. 546, 84 Amer. Dec. 298.

Subsequent adoption and ratification by the principal of similar acts done by the agent may justify insurance that the agent had authority to do acts of that kind. *Whitney vs. West Stage Co.*, 20 Iowa 534; *Stratton vs. Todd*, 82 Me. 149, 19 Atl. 111; *Townsend vs. Chappell*, 12 Wall. (U. S.) 681, 20 L. Ed. 436; *Bickmell vs. Austin Min. Co.*, 62 Fed. 432.

It has been held that the adoption of a single act by the principal may be so unequivocal and comprehensible as to establish an agency to do similar acts. *Anderson vs. Johnson*, 74 Minn. 171, 77 N. W. 26; *Brigg vs. Kennett*, 8 Misc. (N. Y.) 264, 28 N. Y. Suppl. 540.

The doctrine of estoppel, involving apparent or ostensible agency which exists where the principal intentionally or by want of ordinary care, induces third persons to believe another to be his agent although he did not in fact employ him; and apparent authority is such authority as a reasonably prudent man using diligence and discretion in view of the principal's conduct, would naturally suppose the agent to possess. *St. Louis Gun. Adv. vs. Wanamaker*, 115 Mo. App. 270, 295; 90 S. W. 737.

The apparent authority of an agent, which will be sufficient to bind his principal for acts done thereunder, is such authority as he appears to have by reason of the actual authority which he has. *N. W. Thrasher vs. Eddyville State Bank* (Neb. 1917), 114 N. W. 291.

It is a general rule that when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent, either general or for a particular purpose, he will be estopped to denying such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances. *Gosliner vs. Grangers' Bank*, 124 Cal. 225, 56 Pac. 1029; *Dye vs. Virginia Midland R. Co.*, 20 D. C. 63; *Union Stock Yard etc. Co. vs. Malory, etc., Co.*, 157 Ill. 554, 41 N. E. 888; *Keifer vs. Klinsick*, 144 Ind. 46, 42 N. E. 447; *Holder vs. Phelps*, 141 Mass. 456, 5 N. E. 815.

In the case of *Page vs. Methfessel*, 71 Hunn. 442, affirmed in 145 N. Y. 604, 40 N. E. 164, this principle is well discussed, and in *Johnson vs. Jones*, 6 Barb. 369, the Court said that where a person is sought to be charged for the act of another and there is evidence of an apparent authority, the question to be determined is, not what power was intended to be given to the agent, but what power a third person dealing with him had a right to infer from his own acts and those of his principal that he possessed.

In the case of *Hackett, vs. Van Frank*, 105 Mo. App. 384, 394, 79 S. W. 1013, a very interesting case as to a principal being estopped by his own acts relative to an agent where a third person is damaged, the Court said: "The estoppel may be allowed on the score of negligent fault of the principal that where one of two innocent persons must suffer the loss will be visited on him whose conduct brought about the situation, and that the principal may be estopped who permitted the act, or held himself out as an agent, or by negligent conduct created a false impression respecting the agent's authority, or negligently failed to correct such impression by the agent himself when the principal ought to have known is likely to entrap someone, and ratification of an act of an agent need not in most cases be expressed, but may be implied from the acts and conduct of the principal. *Ballard vs. Nye*, 138 Cal. 588, 72 Pac. 156; *Connett vs. Chicago* 114 Ill. 233, 29 N. E. 280; *Barnes vs. Bordman*, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; *Aetna Indemnity Co. vs. Ladd*, 135 Fed. 636.

A ratification of acts of an agent of a corporation may be implied from an adoption or recognition of such acts by the corporation. *Detroit vs. Jackson*, Dougl. (Mich.) 106; *Hombres vs. Kansas City Bd. of Trade*, 181 Mo. 137.

And where the principal has repeatedly recognized and approved similar acts done by the agent, he is estopped from denying the agency as to the injury of an innocent third person. *Ely vs. James*, 123 Mass. 36; *Quinn vs. Dresbach*, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

And as a general rule the principal upon learning of the unauthorized act of his agent, if he did not intend to be bound thereby, must, within a reasonable time, repudiate it. *Hotchkiss vs. Roehm*, 181 Pa. State 65, 37 Atl. 119. *Anderson vs. Johnson*, 74 Minn. 71, 77 N. W. 26; *Union Gold Mining Co. vs. Rocky Mountain Natl. Bank* 96 U. S. 640, 24 L. Ed. 648.

And the repudiation must be communicated to the other party of the transaction and not merely to the agent. *Benent vs. Armstrong* (Tenn. Ch. App.) (1896), 39 S. W. 899.

If the circumstances are such that silence on the part of the principal would be clouded to mislead the other party, a failure to repudiate the act may justify a finding or ratification. *Heyn vs. O'Hagen*, 60 Mich. 150, 26 N. W. 861; *Robbins vs. Blanding*, 87 Minn. 246, 91 N. W. 844.

Secret or private instructions to an agent, however binding they may be as between the principal and his agent, can have no effect on a third person who deals with the agent in ignorance of the instructions and relies on the apparent agency with which the principal has clothed him. *Mabb vs. Stewart*, 147 Cal. 413, 81 Pac. 1073; *Cinn., etc., R. Co. vs. Davis*, 126 Ind. 99; 25 N. E. 878; 9 L. R. A. 503. *Crane vs. Jacksonville First Natl. Bank*, 114 Ill. 516, 2 N. E. 486. *Grand Rapids Elec. Co. vs. Walsh Mfg. Co.*, 142 Mich. 4, 105 N. W. 1. *Cross vs. Atch. R. Co.*, 141 Mo. 132, 42 S. W. 675. *Rathbun vs. Snow*, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355. *Young vs. Coray*, 167 Pa. State 611, 31 Atl. 856. *Farrar vs. Duncan*, 29 La. Ann. 126.

As to third person, such secret instructions are not restrictions upon the apparent authority of a general agent, the persons dealing with the agent are, in the absence of special proof to the contrary, presumed to know only his general authority. *Reynolds vs. Chicago R. Co.*, 114 Mo. App. 670, 90 S. W. 100; *Anderson vs. National Surety Co.*, 196 Pa. State 288, 46 Atl. 346; *Longworth vs. Conwell*, 2 Blackf. (Ind.) 469.

Custom and usage of the authority or business in which the agent is engaged form part of his authority; to such custom and usage the principal is presumed to assent, provided, however, that the evidence thereof is clear, and that such custom and usage is shown to be reasonably uniform and notorious. *Crusan vs. Smith*, 41 Ind. 288; *Monson vs. Kilt*, 144 Ill. 248, 33 N. E. 43; *Lowenstein vs. Lombard, etc., Co.*, 164 N. Y. 324, 58 N. E. 44.

Secret instructions and restrictions to the agent does not effect a third person ignorant thereof; and as between the principal and third person, the mutual rights and liability are governed by the apparent scope of the agent's authority which the principal has permitted the agent to represent that he possessed, and which the principal is estopped to deny. *Lake Shore, etc., R. Co. vs. Foster*, 104 Ind. 293, 54 Amer. Rep. 319; *Louisville R. Co. vs. Tift*, 100 Ga. 86, 27 S. E. 765.

The apparent authority, so far as third persons are concerned, is the real authority and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. *Montg. Furn. Co. vs. Hardaway*, 104 Ala. 100, 16 So. 29; *McGraw vs. O'Neil*, 123 Mo. App. 691, 101 S. W. 132; *Buskirk vs. Talcott*, 96 N. Y. Suppl. 714; *Patterson vs. Neil*, 135 Ala. 477, 33 So. 39; *Brook vs. N. Y. R. Co.*, 108 Pa. State 529, 56 Amer. Rep. 235.

The principal, according to a settled rule of law, is bound by the knowledge of the agent, unless otherwise stated, notice to the agent constitutes notice to the principal. *Field vs. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 A. S. R. 301; *Allen vs. So. Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716; *Wittenbrock vs. Parker*, 102 Cal. 93, 36 Pac. 37, 41 A. S. R. 172.

This rule is derived from the duty of disclosure by the agent of all material facts coming to his knowledge with reference to the subject of his agency and presumption that he has discharged that duty. *Booker vs. Booker*, 208 Ill. 529, 70 N. E. 709, 100 A. S. R. 250; *Lewry vs. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658.

Like natural persons, corporations are held responsible for the knowledge which is possessed by those whom they appoint as their representatives. *Mer. Natl. Bank vs. Lovitt*, 104 Mo. 519, 21 S. W. 825, 35 A. S. R. 770.

And authorities hold there are peculiar and urgent reasons for a more stringent enforcement of the rule against corporations than against individual principals, from the fact that the only way of communicating actual notice to a corporation is through its agents. See note, 36 Am. Dec. 188.

It is held that knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal is imputed to the principal. *Johnson vs. Aetna Ins. Co.*, 123 Ga. 404, 107 A. S. R. 92.

PRINCIPAL'S LIABILITY.

All such statements, declarations, or acts, as are within the scope of the agent's employment or impliedly possessed by him by virtue of his representative character are binding upon the principal. *Borland vs. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, 37 A. S. R. 32; *Adams Exp. Co. vs. Harris*, 120 Ind. 73, 21 N. E. 340, 7 L. R. A. 214, *Cleveland, etc., R. Co. vs. Closser*, 126 Ind. 348, 9 L. R. A. 754, *Isham vs. Post*, 141 N. Y. 100, 23 L. R. A. 90; *Hasbrouck vs. Western Union Tel. Co.*, 107 Iowa 160, 77 N. W. 1034.

The maxim of the common law *respondeat superior*, founded upon the principle that a duty rests upon every man in the management of his affairs, whether by himself or by his agents, or servants, so to conduct them as to not injure another, and that if he does not do so and another is thereby injured, he shall answer for the damage. *Dias vs. Chickering*, 64 Md. 348, 54 Am. Rep. 770.

Corporations are liable to the same extent as natural persons. *Mott vs. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

APPARENT AUTHORITY.

The liability of the principal is not limited to such acts of the agent as are expressly authorized or necessarily implied from express authority, all the acts of the agent as are within the apparent scope of the authority conferred on him are also binding on the principal. *Prusley vs. Morrison*, 70 Ind. 356, 63 Am. Dec. 427; *Beck vs. Minn. etc. Grain Co.*, 131 Iowa 62, 72 L. R. A. (N. S.) 93; *Laison vs. Metropolitan St. R. Co.*, 110 Mo. 234, 16 L. R. A. 330.

Apparent authority being that which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds him out as possessing. *Adams Exp. Co. vs. Canahan*, 29 Ind. App. 606, 63 N. E. 245, 94 A. S. R. 279; *Dispatch Printing Co. vs. Natl. Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N. S.) 74.

The actual instructions from principal to agent does not govern the case unless the person dealing with him had notice, or was put upon inquiry as to his real authority. *Kansas St. R. Co. vs. Higdon*, 94 Ala. 286, 14 L. R. A. 515; *Wachter vs. Phoenix Assurance Co.*, 127 Pa. St. 428, 19 Atl. 289, 19 A. S. R. 600.

Apparent authority may be, and often is, derived from the course of dealings, or from the number of acts assented to or not disavowed. *Dierkes vs. Hauxhurst Land Co.*, 80 N. Y. Law 69, 34 L. R. A. (N. S.) 693.

Whenever a principal has placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform. *Ala. Great So. R. Co. vs. Southern R. Co.*, 84 Ala. 570, 30 So. 286; *Union Stock Yds. Co. vs. Mallory etc. Co.*, 157 Ill. 554, 48 A. S. R. 341; *Adams Exp. Co. vs. Canahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 A. S. R. 279.

The principal will not be permitted to prove that the agent's authority was, in fact, less extensive than that with which he apparently was clothed. *Garfield Coal Co. vs. Rockland-Rockport Lime Co.*, 184 Mass. 60, 61 L. R. A. 946.

EVIDENCE OF AUTHORITY.

As against one who is assumed to act as the agent of another: The presumption is that he had authority to do the acts in question. *Montgomery vs. Pacific Coast Land Bureau*, 94 Cal. 284, 29 Pac. 640, 28 Am. St. 122; *Shield vs. Coyne*, 148 Iowa 313, 29 L. R. A. (N. S.) 472.

A very general mode of establishing authority on the part of the agent to bind the principal is by proof of recognition by the principal of other similar acts and transactions performed by the agent. *Green vs. Clay*, 10 Allen (Mass.) 90, 14 L. R. A. 208; *Union Stock Yds. Co. vs. Mallory, etc. Co.*, 157 Ill. 554, 48 A. S. R. 341.

The evidence of a custom or usage to make similar contracts to the one in suit is admissible to aid in determining whether the agent had authority to make the contract in question. *Kaufman vs. Farley Mfg. Co.*, 78 Iowa 679, 16 A. S. R. 642.

So far as third persons are concerned, the principal, as a rule, may revoke the authority of his agent at any time. but it is settled that the acts of his agent after his authority has been revoked bind the principal as against third persons, who, in the absence of notice of the revocation of the agent's authority, rely upon its continued existence. *Van Dusen vs. Star Quartz Mining Co.*, 36 Cal. 571, 95 Am. Dec. 209; *Union Bank etc. vs. Longpole Lumber Co.*, 70 W. Va. 558, 41 L. R. A. (N. S.) 663, and Note.

If an act done by an agent is within the general scope of the authority with which he is clothed, it matters not that it is directly contrary to the instructions of the principal; the principal will, nevertheless, be liable. *Lake Shore, etc., R. Co. vs. Foster*, 104 Ind. 293, 54 Am. Rep. 319; *Rickards vs. Rickards*, 98 Md. 136, 63 L. R. A. 724.

Special instructions limiting the authority of an agent, whose powers would otherwise be coextensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. *Towle vs. Levitt*, 23 N. H. 360, 55 Am. Dec. 195; *Wilson vs. Com. Union Assurance Co.*, 51 S. C. 540, 54 A. S. R. 700.

This action being based largely on letters and cablegrams as making a contract, I now refer to the law as applicable to such contracts. Both in England and the United States, parties may, and often do, enter into a contract by communicating their intention through the post office, instead of orally. *Dana vs. Short*, 81 Ill., 468; *Thames L. & T. Co. vs. Beville*, 100 Ind., 309; *Clark vs. Dales*, 28 Barb., 42; *Ames vs. Pierson*, 174 Pa. State., 597, 34 Atl., 317; *Patrick vs. Bowman*, 149 U. S., 411, 37 L. Ed., 790. And by telegram, *Miller vs. Nugent*, 12 Ind. App., 348, 40 N. E., 282; *Haas vs. Myers*, 111 Ill., 421, 53 Am. Rep., 634; *Minn. Linseed Oil Co. vs. Collier White Lead Co.*, 4 Dill., 431, 17 Fed. Case No. 9635, and in either case as soon as an offer is thus made and accepted there is a binding contract. See cases previously cited.

Where a person uses the post office to make an offer, the post office becomes his agent to carry the offer; the offer is not made when the letter is posted but when it is received. *Averill vs. Hedge*, 12 Conn., 424; *Mactier vs. Frith*, 6 Wend. (N. Y.), 103, 21 Am. Dec., 262.

Where a person makes an offer and requires or authorizes the offeree, either explicitly or impliedly, to send his answer by post or telegram, and the answer is duly posted or telegraphed, the acceptance is communicated and the contract is complete from the moment the letter is mailed or the telegram sent. See cases previously cited.

It will be seen that the authorities hold that a contract is complete as soon as the letter containing the acceptance is mailed or the telegram sent, regardless of whether there is any delay or accident in the transmission of the letter or the telegram accepting of the offer. See *Linn vs. McLean*, 80 Ala., 360; *Haas vs. Myers*, 111 Ill., 421, 53 Am. Rep., 634; *Barr vs. Insurance Co. of N. A.*, 61 Ind., 488; *Egger vs. Nesbitt*, 122 Mo., 667, 27 S. W., 385, 43 A. S. R., 596; *Patrick vs. Bowman*, 149 U. S., 411, 37 L. Ed., 790.

In *Lewis vs. Browning*, 130 Mass., 173, it is held that the acceptor takes the risk of his letter being lost or delayed. On this point see also *Brauer vs. Shaw*, 168 Mass., 198, 46 N. E., 617, 60 A. S. R., 387.

An agreement may be collected from several different writings, which when connected show the parties, subject matter, terms, and conditions, as in the case of contracts entered into by correspondence. See authorities previously cited.

An agreement may be partly in writing and partly by word of mouth. *Bordon vs. Bordon*, 96 Ind. 134.

However, where the parties have undertaken to put their contract in writing, parol evidence of a contemporaneous or prior oral agreement is not admissible to add to its terms or to contradict them.

And contract may be in writing as to one party, and oral as to the others, as where a person makes his offer in writing and the other party accepts orally, or *vice versa*. *Prove vs. Hodges*, 55 Pa. State 504.

And where a proposal is made in writing by one party and accepted by the other, either verbally or by acting on it, the contract is a written one.

An offer to sell goods sent by mail in the usual course of business, without expressly requiring an answer by return mail, must, generally, be accepted by the mail leaving during business hours on the day which the offer is received, although not necessarily by the next post. *Naclay vs. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Ballerman vs. Morford*, 76 N. Y. 622; *Orlman vs. Weaver*, 11 Fed. 358.

The question of reasonable time is usually a question of law for the court. *Nunez vs. Dautel*, 19 Wall. (U. S.) 560, 22 L. Ed. 161; *Trounstein vs. Sellers*, 35 Kan. 447, 11 Pac. 441.

Each of the parties introduced letters, and duplicate or carbon copies of letters over objections of each party, some of the objections going to the question of no notice being served on the opposite party to produce the letters in court, and also on the point of the want of sufficient foundation being laid for the introduction of letters and the typewritten carbon copies or duplicates of the letters, and that both parties may fully understand the rulings of the court in the introduction of such letters or duplicates or carbon copies, I think it advisable to cite the law under which the court admitted such documents:

In Wigmore on Evidence, Vol. 2 section 1205: "It is clear that the proponent's notification of his need for a specific document may be made otherwise than by an express writing formally calling upon the opponent to produce. Where by necessary implication the opponent has become informed to that effect, there is sufficient notification, such that the opponent's failure to produce will place the proponent at liberty to prove the contents otherwise."

"The chief instance of such a notice by necessary implication occurs where by the pleadings of the proponent the cause of action makes it clear that he will need to prove, as a material part of his case, that contents of a specific document in the opponent's possession."

1811, *LeBlanc, J.*, in *How vs. Hall*, 14 East, 274, 277: "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice."

[NOTE]. "Where from the nature of the suit, the opposite party must know that he is charged with possession of the instrument;" here he applied the law requiring 1 month before bringing suit.

Action on contract; pleadings held to imply notice as to orders and letters from plaintiff to defendant. Note on page 1427.

Section 1208 (on p. 1434): "Where the opponent is out of the jurisdiction it would seem that the time of notice should not be affected by this fact, since in general, for the purposes of a trial, a party must himself bear the risk of his absence from the scene, especially as in the present instance the only function of a notice is to make it clear that the proponent is reasonably unable to obtain the document."

[NOTE]. "Notice the night before to the attorney, held sufficient, the document being one which he and not the client would have. Notice the day before held sufficient, where it appeared that the document was destroyed. The principle is that reasonable time to produce a document must be given, where the defendant long knew that the document would be wanted, and notice the day before the trial was sufficient.

On page 1435. As to the tenor and form of the notice, first, it should be in writing, not so much because it is thereby more correctly or surely proven, as because it is intended to procure the document and this is more likely to attain its purpose if filed with the other papers in the cause. Next, the particularity of the description of the document desired should depend on no formal tests; it is enough if the document desired is so described that it could be readily known by the opponent and with certainty distinguished from others. In the case of *Rogers vs. Custance*: "Said that the Court did not mean to lay down any general rule as to what the notice ought to contain; that much must depend on the particular circumstances of each case; but where enough was stated on the notice to leave no doubt, that the party must have known the particular instrument would be called for, the notice must be considered sufficient to let in secondary evidence."

Sec. 1209: "It has already been seen that the present excuse for a proponent's nonproduction rests on the broad fact that he can not obtain it from the opponent, a fact involving three separate elements, viz., the opponent's possession, a demand or notice to produce, and his failure to produce."

On page 1436, the Court says: "Inquiring, first, what situation amounts to nonproduction in the above sense, it may be noted that if the opponent produces a document which the proponent claims not to be the one desired, the latter is not obliged to accept it as the one in issue, so as to be precluded from proving otherwise the contents of the desired document."

Sec. 1213. It has been seen that the amenability of the possessor to legal process should not invariably and absolutely bar the proponent from proving the document's contents by other evidence. Conversely, the mere fact of the nonamenability of the possessor to legal process should not of itself excuse nonproduction. Legal process can not avail to obtain a document held out of the jurisdiction; but the object may nevertheless be attained by a request. Four possible

forms of effort exist, any one or more of which may be deemed proper by a court before excusing for nonproduction. If the precise whereabouts of the document is unknown, search may be made; if the possessor be ascertained, he may be required to appear with the document; or he may be requested to deliver the document for use at the trial. No one or more of these efforts could be required as a fixed rule, nor do the courts seem to make any fixed requirement. The rulings fall into three general groups. In the first group, the courts require that an effort of some sort be made, its nature depending more or less upon the circumstances of the case. In the second group, the courts, either by express decision or by failing to mention any requirement, excuse the nonproduction although no such effort has been made, the mere fact sufficing that the document is out of the jurisdiction. In the third group, the effort actually made is declared to be sufficient without laying down any rule as to its necessity.

Letters in a foreign country; production not required. *Martin vs. Brown*, 75 Ala., 442, 447.

Quoting from Bradner on evidence (2d Ed.), on page 247: "The burden is upon the party seeking to make use of secondary evidence to establish either that the paper is beyond the jurisdiction of the court, or that it is lost or destroyed, even though a copy is set out in the pleading. And as a general rule, secondary evidence has, if the original is in the possession or under the control of the adverse party, given him such notice to produce it in the court, as the court regards reasonably sufficient to enable it to be produced. * * * Such notice is not required in order to render secondary evidence admissible in any of the following cases: When the document to be proved is itself a notice; when the action is founded upon the assumption that the document is in the possession of the adverse party and requires its production; and when it appears or is proved that the adverse party has obtained possession of the original from a person subpoenaed to produce it; when the adverse party or his agent has the original in court, or admits that it does not exist," then secondary evidence is admissible.

Nonresidence of the person to whom a letter was addressed is insufficient to render parol evidence of its contents admissible in the absence of any effort to produce the letter. But a letter press copy is admissible in evidence where the original letter is shown to be beyond the court's jurisdiction.

Where any paper is in the possession or under the control of the adverse party, a reasonable notice must be served on him or his attorney to produce it, and secondary evidence of its contents can not be given unless such party neglects or refuses to produce it after

such notice. The sufficiency of the notice, both as to matter and time, rests in the discretion of the court in view of all the circumstances. According to some authorities the object of a notice to produce is not merely to enable the party served to have the document in court, but also that he may be prepared with evidence to explain, nullify, or confirm it. In the case of *Dwyer vs. Collins*, it was held that the sole object of such a notice was to enable the party to have the document in court to produce it if he likes; and if he does not, then to enable the opponent to give secondary evidence.

Section 30 (p. 252). As a general rule there are no degrees of secondary evidence. Satisfactory evidence of the contents of the writing must be produced. Where a copy is offered its accuracy must be shown, but a copy of a letter taken by a copying machine, although still only a copy, will be presumed to be correct. (On p. 254): The contents of a letter written to a person residing in another State may be proved by secondary evidence without proving its loss or destruction. *Manning vs. Maroney*, 87 Ala., 563, 12 Am. St. Rep., 67.

In the case of the *International Harvester Company of America vs. A. W. Elfstrom*, 101 Minn., 263, 112 N. W., 252, reported in 12 L. R. A. (N. S.), 343, the Court holds that the different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals, and either may be introduced in evidence without accounting for the nonproduction of the other. And in the annotations we find carbon copies of documents are generally received in evidence as duplicate originals. In addition to the authorities on that subject set forth in the *International Harvester Company of America vs. A. W. Elfstrom*, the following are points: A copy of a report of an accident, which is one of three, all made at the same time by the same impression of the copying pencil, must be regarded as triplicate originals. *Virginia-Carolina Chemical Co. vs. Knight*, 106 Va., 674, 56 S. E., 725. Contracts executed by the parties thereto in duplicate or triplicate form may be denominated duplicate or triplicate originals; and they are all primary evidence, one as much as the other. *Totten vs. Bucy*, 57 Md., 446. The authorities agree that letterpress copies of documents are not admissible as originals. *Menasha Wooden Ware Co. vs. Harmon*, 128 Wis., 177, 107 N. W., 299; *Haas vs. Chubb*, 67 Kan., 787, 74 Pac., 230; *Anglo-American Packing & Provision Co. vs. Cannon*, 31 Fed., 313.

In the *International Harvester Company* the Court says: "The remaining question relates to the reception in evidence of what the appellant claims was a mere copy of the contract without having first accounted for the absence of the original. This presents an

interesting and somewhat novel question, but which, by reason of the introduction of labor-saving devices in modern offices, is liable to arise more frequently in the future. A sheet of carbon paper was placed between two sheets of order paper, so that the writing of the order upon the outside sheet produced a facsimile upon the one underneath. The signature of the party was thus reproduced by the same stroke of the pen which made the surface, or exposed, impression. In *State vs. Teasdale*, 120 Mo. App., 692, 97 S. W., 996, it was held that a carbon copy of a letter was not admissible in evidence until the original letter from which it was made was accounted for. The signature would not, under ordinary circumstances, appear upon the carbon copy of such a letter. In *Chesapeake & Ohio R. Co. vs. Stock*, 104 Va., 97, 51 S. E., 161, it was held that a carbon copy made at the same time and by the same impression of type may be regarded as a duplicate original of the letter itself, and admitted in evidence without notice to produce the letter. We think this view can be sustained and that a clear distinction exists between letterpress copies of writings and duplicate writings produced as was the contract in the case at bar. It is well settled that, where a writing is executed in duplicate or multiplicate, each of the parts is the writing which is to be proved, because by the act of the parties each is made as much the legal act as the other. *Crossman vs. Crossman*, 95 N. Y., 148; *Hubbard vs. Russell*, 24 Barb., 408; *Lewis vs. Payn*, 8 Cow., 71, 18 Am. Dec. 427; *Jackson ex dem. Dale vs. Denison*, 4 Wend., 558; *Barr vs. Armstrong*, 56 Mo., 586; *Weaver vs. Shipley*, 127 Ind., 526; 27 N. E., 146; *Cleveland & T. R. Co. vs. Perkins*, 17 Mich., 296; *Phillipson vs. Chase*, 2 Campb., 110. In the annotation it says "Written notices of a demand of possession of land, prepared at the same time, and all alike except that three of them were addressed to different tenants and the fourth retained by the party who prepared them, are all original duplicate papers." *Gardner vs. Eberhart*, 82 Ill., 316; *Westbrook vs. Fulton*, 79 Ala., 510.

Having now cited the issues and the principles of law and decisions which are more or less applicable to the evidence in this case, the Court will now review in a general way the important points of the evidence.

Since 1915 or for a period of 2 years or more prior to the alleged contract in this case the defendant company maintained an agency on the Isthmus of Panama, and had furnished an office and quarters for its agent on the Canal Zone, and had during that period of time residing on the Canal Zone one C. F. Elder, its agent, who was representing the defendant company during all of that time, securing sales of oil for the company, negotiating agencies for the company, and securing orders for oils, which were reported to defendant com-

pany and the orders filled as taken by said Elder, but in this case the defendant while admitting that Elder was actually its agent on the Isthmus, yet that he had no authority to bind the defendant company in negotiations and sales of kerosene oil, and refused to fill the order taken from the plaintiff company by the said Elder as alleged in the complaint herein. It is passing strange that the defendant company never took the deposition of the said Elder or produced him at the trial if, in fact, the defendant company could have shown by the said Elder that he had no authority to take orders, fix prices, or negotiate sales of oil on its behalf; and, further by the taking of the deposition of Elder or having him testify in this case the defendant company could have shown, if it was true, that the said Elder did not hold himself out to the trade and public on the Isthmus of Panama as having authority to negotiate sales, give prices and have orders filled by the defendant company, and it is fair for the Court to presume that the defendant company knew that Elder could not be of service to it, either by way of deposition or witness in the case, else it would have produced the evidence from him. It is further shown that ever since the time of the said alleged contract that the defendant had maintained a like agency on the Isthmus of Panama, and is now represented by one Percy Van Wagner.

As alleged in the complaint, the defendant through its said agent Elder, contracted with the plaintiff company in October, 1917, to sell to plaintiff company 5,000 cases of kerosene oil at \$1.40 United States currency per case of 2 tins containing 5 gallons each f. o. b. New Orleans, less 2 per cent cash discount. As heretofore stated this contract between plaintiff and defendant is based on oral negotiations and letters passing between the parties which will be hereinafter referred to, as will also be shown by the testimony, including the letters, that these 5,000 cases of oil were for future delivery during the months of January and February, 1918. The evidence shows that the defendant company knew that the plaintiff could dispose of 2,500 or more cases of kerosene each month, and that the plaintiff company had to keep a large surplus stock of oil on hand to supply its retail demands. The evidence further shows that the plaintiff obligated itself to sell large quantities of oil elsewhere than on the Isthmus of Panama, and was depending upon the said 5,000 cases contracted from the defendant company to supply the trade on the Isthmus and the foreign trade which the plaintiff then had for oil. And the evidence further shows that the plaintiff company was compelled to go into the open market and purchase oil at a much higher price in order to fill the orders and supply the trade of the plaintiff company because of the failure of the defendant company to deliver the oil as per contract.

It is stipulated by counsel for plaintiff and defendant that the price of kerosene oil, f. o. b. New Orleans, after the contract alleged in this complaint, ranged from \$1.40 per case, to \$1.87 per case in January, 1918, and the local selling price likewise rose from \$2.10 per case, to about \$2.40 per case in January, 1918; there being no stipulation as to the price of oil on the Isthmus in February, 1918, the plaintiff introduced evidence showing that the price of kerosene oil in 5-gallon tins, two tins to the case, had reached from \$2.60 to \$2.75 per case in that month.

The plaintiff for the purpose of showing that the said Elder was the duly authorized representative of the defendant company on the Isthmus of Panama at the time of entering into the alleged contract, and had the right to bind the defendant company in the sale of oil, first introduced a witness, Mr. Ramon Arias Feraud, sr., president, treasurer, and manager of the plaintiff company, a man of mature years, of very large extensive business interests, and whose appearance, candor, honesty, fairness, and business knowledge very favorably impressed this court. He testified that the plaintiff company was composed of a very large number of stockholders, and that his sons, George Arias Feraud and Ramon Arias Feraud, jr., had authority to represent plaintiff company in the purchase and sale of oil, and they being younger than the witness, gave more attention to the details of the business than could witness, whose other financial interests were large and extensive. The senior Arias testified that in 1917 the said C. F. Elder of the defendant company came to the store of the plaintiff in Panama City, endeavoring to place an order with the plaintiff company for the sale of oil from the defendant company. The following questions inquired of the said witness and the answers will give more fully the knowledge of the witness as to said Elder's agency of the defendant company:

Q. You stated that Mr. Elder had called at your place of business in the city of Panama a number of times to transact business, was that prior or since the time alleged in your complaint that contract had been made between plaintiff and defendant for the sale of oil to the plaintiff?

A. Before.

Q. When Mr. Elder called at your place of business (of the plaintiff) as you state to transact business with you, state whether or not it was on his behalf or for some other person?

A. On behalf of the Texas Company.

Q. It was on behalf of the Texas Oil Corporation?

A. Yes (shown by assent, nod of witness's head).

Q. State whether or not plaintiff knew at the time mentioned in your answer as to Mr. Elders coming there for business that he was representing himself or defendant company in the transaction of business?

A. He was representing the Texas Oil Company.

Q. State, if you know, whether or not Mr. Elder held himself out in the community of Panama and in the Republic of Panama as agent or representative of the defendant company in buying and selling oil?

A. He was representative of the Texas Oil Company.

Q. State whether or not Mr. Elder at the time you mentioned of the transaction in which it is alleged in this complaint, and prior thereto, was holding himself out as agent of the defendant company and taking orders for the sale of oil on behalf of the defendant company in the city of Panama and elsewhere?

A. I know in the city of Panama he was.

Q. In the city of Panama?

A. Yes.

Plaintiff further testified that in 1917 the said Elder, on behalf of the Texas Company, came to plaintiff's store in Panama City for the purpose of selling oil to plaintiff.

One Mr. C. Quelquejeu, a prominent and successful business man of the city of Panama, was next called as witness on behalf of plaintiff and stated he had been engaged in commercial pursuits on the Isthmus for the past 30 years, and was acquainted with the said Elder during the fall of 1917, and at that time had business dealings with the defendant company through the said Elder as agent, and that the said Elder corresponded with witness on stationery of the Texas Company, and always held himself out in business relating to the sale and purchase of oil as an agent and representative of the Texas Company, and that witness had purchased oil from said Elder as the agent of the defendant company, and among the questions and answers in the examination of this witness are the following:

Q. * * * Did you state that during the fall of 1917 when you were negotiating with Mr. Elder, he claimed to be the representative of the defendant company, and resided in a house provided by the defendant company on the Canal Zone?

A. Yes. * * *.

Q. State, if you know, whether or not Mr. Elder held himself out as the representative of the defendant company?

A. Yes.

Q. Was that a matter that was notorious or otherwise?

A. Everybody in business in Panama regarded him as the representative of the Texas Company.

On cross-examination the witness stated he always understood when Mr. Elder sent him a reply to orders that same was confirmed and that it was all right, and when Mr. Elder told him it was all right and accepted he assumed everything was all right, and that he did not feel obliged to write to the defendant company direct in order to find out whether or not what Mr. Elder told him was accepted as an order was really accepted by the Texas Company of New York.

Mr. Ramon Arias, jr., was next called as a witness and testified that he knew Mr. Elder to be the representative of the Texas Company in the Republic of Panama, and that Mr. Elder had so held

himself out to him in various conversations, and not only this, but that he had received letters from the Texas Company who stated this to be a fact; that as early as April and May, 1917, the plaintiff company took up direct with the Texas Company of New York the question of prices relative to kerosene oil, as plaintiff wished to avoid payment of commissions to any local agent or agents on the Isthmus, and at which time the Texas Company of New York replied to plaintiff's letter requesting plaintiff to negotiate further with the defendant's agent, Mr. Elder, who at that time was on the Isthmus (see plaintiff's Exhibit No. 6, letter of June 14, 1914); and thereafter plaintiff company did business direct with Mr. Elder as agent and representative of the Texas Company.

Among the questions and answers in the evidence of this witness are the following:

Q. * * * When you wrote to the Texas Company relative to your having the sales agency of the oil in Panama was the letter which was introduced referring you to Mr. Elder an answer to that letter?

A. We wrote to the Texas Company asking them to quote us prices, and they wrote us back that Mr. Elder would make us quotation from time to time.

Q. Did the plaintiff company then negotiate with Mr. Elder at the suggestion of the defendant company by its letter so written from New York?

A. Yes, sir.

Q. From that time did the plaintiff company negotiate with Mr. Elder for the purchase of oil from the defendant company?

A. Yes, sir.

Q. Was the purchase of the oil from the defendant company through its agent, Mr. Elder in pursuance of the suggestion so made by the defendant company in that letter to you?

A. Yes, sir.

The counsel for the parties, prior to entering into the trial of the case, stipulated that if Messrs. Frank J. Shipman and C. E. Woodbridge, who are residents of New York and employed by the defendant company, would be present at the trial of this cause, that they would state that Mr. Elder was merely employed by the defendant company to take care of its oil stock and property on the Canal Zone; that incidently, his duties were to receive and transmit orders to the defendant company; that Elder had no authority to negotiate sales for the defendant or to make any sales on behalf of the company; that the defendant was authorized to do business in many places outside of the United States, and had been engaged in business in the Canal Zone since 1913, but had never been engaged in business in the Republic of Panama; that at no time was Mr. Elder the representative of the Texas Company in the Canal Zone, and had never effected any sales for oil there or in the Republic of Panama; that at no time has the Texas Company ever shipped any oil to purchasers who negotiated sales with Mr. Elder.

The defendant introduced Mr. Percy Van Wagner, who stated he was the representative of the defendant company in the Canal Zone; that as the defendant had contracts with the United States Government, The Panama Canal, and the Panama Railroad, and it also had fuel oil stored on the Isthmus in its tanks at Mount Hope, Canal Zone; that he looked after the company's interests and its contracts, that he made sales for the defendant company to passing ships. This witness identified the signature of Mr. Elder to much of the correspondence that has passed between plaintiff and defendant, and stated that he had forwarded to the New York office of the defendant company most of the correspondence relating to this case.

Practically all the balance of the testimony in this case was that of letters and typewritten carbon copies or duplicates of letters passing between the plaintiff and defendant and said Elder, and I will now refer to that correspondence.

On January 4, 1915, the plaintiff company received a letter from Mr. H. N. Cook, Superintendent of the Texas Company at New Orleans, advising in part as follows:

* * * beg to advise that we have forwarded all documents to our representative, Mr. C. F. Elder, who will be glad to deliver them to you.

Under date of April 28, 1917, the Texas Company, by C. F. Elder, addressed a communication to the plaintiff company, from which I quote:

With reference to conversation with Mr. George Arias, we can offer you our kerosene in 2/5 cases at \$1.50 U. S. per case, f. o. b. New Orleans, and would be glad to have an order from you, as it has been over 1 year since your last order.

Would be glad to have you take a record of our telephone number, Colon, No. 247, on the Canal line, in case it should be needed. Have been calling you to-day, but was unable to catch Mr. George in the office. * * *

Under date of May 2, 1917, the plaintiff in reply to the last mentioned letter addressed a letter to the defendant company as follows:

Replying to your letter dated 29th ulto., quoting us kerosene in 2/5 cases at \$1.50 U. S. C. per case, f. o. b. New Orleans:

We wish to state we rather that you quote us f. o. b. Panama, and with the assurance that from the price quoted Canavaggio will make no commission, as we do not care for others to profit at our expense.

Due notice has been taken of your telephone number also your postal address
* * *

Under date of May 7, 1917, the plaintiff company addressed a letter to the Texas Company, 17 Battery Place, New York City, from which I quote:

From years back I have been trying to buy from you, your oil, which I purchase for my clients; but, unfortunately, up to now, we have not been able to come to terms. In 1915 when I was in New York, I called on you, but you told me that you had some contracts for the sale of your oil, and that you could not offer any business at that time. Since you have had some agents come to Panama, but they generally stay in

Colon, and lately, when I wanted to buy a quantity of oil the price of \$1.50 f. o. b. New Orleans, which I was offered, was not suitable to me. Freight has been raised 50 per cent, and as a case of oil from New Orleans paid freight before at 30 cents per case, it amounts now to 45 cents per case, besides consular charges, etc.; therefore, your price comes much higher than \$2 gold per case to me, at which price the West India Oil Co., is selling their oil in cases of 10 gallons brought from New York.

Now, if you have an agent for Panama and Colon, I must be clear with you, that if I buy, or do any business in oil with you, I can not consent to pay, directly or indirectly, any commission to your agent here, and it would be on this offer from you that I may be ready to do business with your oil in this city. I know if I open business with you, I can sell large quantities of oil on the Isthmus, at least, not on the Colon side, but in Panama, and ports of the Pacific coast. If convenient, please advise me by letter or by cable, what would be your price for the kind of oil you ship to Panama, same packing, etc., on a quantity of say, 2,000 to 3,000 cases, each containing 2 tins, of 5 gallons each tin. Quote me prices delivered Panama, I to pay here only the duty to the Government on the oil. * * *

June 14, 1917, the defendant company of New York, by its sales manager, Mr. C. E. Woodbridge, wrote the plaintiff in reply to the last letter, from which I quote:

Receipt is acknowledged of your letter of May 7th in connection with your request to quote prices f. o. b. New Orleans. We would advise that we would be pleased at any time to make you a quotation based on the market price f. o. b. New Orleans. We respectfully refer you to our Mr. Elder, our representative in Panama who is located in Cristobal, and who will quote you from time to time if desired. * * *

Thanking you for your inquiry and trusting we may have the pleasure of doing business, we are—

On June 29, 1917, as requested by the defendant company, the plaintiff wrote the said Elder, from which I quote:

We are in the market for 2,000 $\frac{1}{2}$ " cases kerosene oil 150° fire test, each tin containing 5 gallons 2 tins to the case, on which we would thank you to submit us your very lowest price delivered Panama. * * *

To which last mentioned letter the Texas Company, in letter bearing date of Cristobal, Canal Zone, July 2, 1917, replied to the plaintiff as follows:

Your letter of June 29th just received this evening. Same is postmarked at Panama June 29th, 9 p. m., but was not placed in our box on Sunday.

The writer will call on you Tuesday, probably not before the afternoon as it now seems that I will have to work at Balboa in the morning, but it may be possible that I can offer you an attractive price.

On July 9, 1917, the plaintiff wrote the said Elder, agent of the defendant company, as follows:

With reference to the offer of oil you made us at \$1.40 per case less 2 per cent for cash, we beg to tell you that we would accept your offer at the price of \$1.88 per case delivered at our warehouse. * * *

We would therefore thank you to let us know at your earliest convenience, if you accept. We can obtain this oil at this figure from other sources, but as you have shown us your desire of wanting to do business with us, we wish to reciprocate, in the same way.

October 9, 1917, the plaintiff addressed a letter to said Elder, from which I quote:

* * * Oil in cases: You are to write to your New York office with regards to the 5,000 cases which you have sold us at \$1.40 a case, to see if they can delay shipment of same till January and February, 1918, instead of December this year, because as you will appreciate, in the first place the market is well overstocked with oil and you know that West India Oil Co., as Canavaggio paid very little interest in the sale of your oil have contracts with most of the chinamen merchants for 2 and 3 months to come at the old price, and while we know we will obtain all this business for reasons that you are well aware with, still it will probable not be till January that we will have full control of the market; secondly, because we understand that you sold to Quelquejeu two or three thousands cases, and while we are satisfied, that as soon as we get in the market again they will abandon this business still for the time being we have to allow them to sell what they bought and every case they sell, will be a case that we sell less. We have received on the *Parismina* 3,000 cases and have we suppose 2,000 cases on the way, so this oil will last us till the latter part of December due to the circumstances above referred, so really we will not begin to use the 5,000 cases that you have sold us till January to take care of the contracts that we have made with your authorization.

October 10, 1917, the said Elder wrote a letter to plaintiff in reply to the last mentioned letter, in part as follows:

This will confirm my conversation with Mr. George Arias to-day, accepting your order for second lot of 5,000 cases kerosene in 2/5 gallon tins, same price, \$1.40 U. S. C. f. o. b., New Orleans, same condition as last lot, to be shipped within 30 days, or during the month of December, we to furnish storage if any part of same required in our warehouse at Chorrillo, or if shipped during January and February, no storage to be furnished. * * *

The plaintiff on October 11, 1917, wrote said Elder as follows:

We hasten to reply to your esteemed favor of yesterday, in which you confirm our order for a second lot of 5,000 cases of Crystalite kerosene, in 2/5 gallon cans, same price, \$1.40 U. S. C., f. o. b. New Orleans, and same conditions as the last lot, which was purchased in New York by our Mr. Ramon Arias Feraud, jr.

According to your request, this will be our written order to you, confirming our verbal order for the purchase of the 5,000 cases of kerosene at \$1.40 U. S. C. free on board, New Orleans, and same conditions as the last shipment. * * *

October 12, 1917, the plaintiff wrote the Texas Company, 17 Battery Place, New York City, in part as follows:

* * * * *

We beg to hand you copy of a letter that we have addressed to our esteemed friend, Mr. Elder, and we hope that after you consider our letter, and he has taken the matter of the agency with you, that you may decide to answer us either through him, or direct, favorably.

We feel satisfied that we could get control of the market and especially increase the sales of your lubricating products, because since Mr. Gray left this market, we have noticed that your oils and greases are hardly noticed anywhere. This is due, more than anything else, because we think Mr. Canavaggio does not give to the business the attention it requires.

As you have noticed by the letter we have sent to Mr. Elder, and by his reply to us, copy of which we think that you will receive in due time, that he has booked for us another 5,000 cases, and we hope that this initial order will succeed in bringing our business relation to a point that it will be to mutual advantage.

In the examination of Mr. C. Quelquejeu, two letters were introduced (plaintiff's Exhibits 2 and 3), one bearing date of September 27, 1917, to the said Elder, agent, and Mr. Elder's reply to same on the letter head of the Texas Company, bearing date of September 30, 1917, which I quote:

Referring to conversation of recent date I wish to place order for further quantity of 1,000 cases Texas Red Star, Crystalite, 1,500 cases of two 5-gallon tins, at \$1.40 per case f. o. b., New Orleans, less 2 per cent cash discount, shipment to be effected within 3 months.

This order is placed with the understanding that storage at your warehouse will be free to me.

Please confirm this at your convenience and advise the approximate time of shipment so that I may arrange to cover invoice value in due time.

Receipt is acknowledged of your favor of September 27th, ordering another 1,000 cases kerosene, for which accept thanks.

I understand the conditions to be the same as on previous orders, price, discount, etc., as per your letter, we agreeing officially to protect the price 30 days and furnish free storage for 30 days also, but I am sure you will find everything satisfactory in every way, thanking you for the order, which makes a total of 5,000 cases pending, and for all past favors, we remain,

Very truly yours,

THE TEXAS COMPANY,
By C. F. ELDER.

And these letters clearly demonstrate that the said Elder was dealing on behalf of the defendant company with the said Quelquejeu.

The plaintiff, without objection on the part of the defendant, introduced in evidence the following letter from the said Elder to Mr. Frank J. Shipman, of New York City, bearing date of Cristobal, November 13, 1917:

Orders for C. Quelquejeu.

Receipt is acknowledged of your letter of October 20th and 31st, regarding confirmation of orders placed by the above concern, etc. My file containing the orders in question was mailed you November 10th, and when a final decision is reached as to whether we will be able to fill the orders we took from Quelquejeu I would be glad to have you cable me, so that in the alternative he can arrange to get out of it with a minimum loss in both money and prestige.

I talked with George Arias over the telephone to-day and think he will offer little or no protest regarding cancellation of his order. Canavaggio Hnos. will protest, as is their habit. Halphen offered no protest whatever, but Quelquejeu's orders are on a different basis as he took written orders to cover and gave written confirmations, placing orders with us in turn, so that I hardly see how he can get out of filling same. He was offered kerosene at \$2.10 gold per case delivered Panama City, last week by the West India, but did not buy, thinking that he was covered.

The defendant introduced without objection on the part of plaintiff, letter bearing date of October 3, 1917, written by the witness, Quelquejeu, to said Elder, of the Texas Company, and in part reads as follows:

I have your favor of the 30th ulto. confirming a quantity of 5,000 cases Texas Crystalite 150°, but with reference to your statement that you agree officially to protect the price 30 days I wish to advise that all my orders have been placed at the price of

\$1.40 f. o. b., New Orleans, and with the distinct understanding, when I have requested that you delay shipments as far as possible that this would mean, that shipments were to be made before any advance in price would affect my orders. * * *

Further all but my last order have been in your hands for more than 30 days and the funds to cover shipments have been at the disposal of your company for several months and in no way can my orders come under the clause that the price would be protected for 30 days, being placed at a firm basis of \$1.40 f. o. b., New Orleans, less discount, to be shipped at your option and as far as possible, only, at the periods stipulated, which as regards to promptness have been deferred not by me, but by your New York or New Orleans office, the first part of my order being placed long before the stevedore strike. * * *

This letter surely goes far in sustaining plaintiff's contention that said Elder was the representative of the defendant company at the time of the alleged contract, and shows that the said Elder confirmed the sale of 5,000 cases of oil to the said Quelquejeu, and further shows that the said Elder agreed officially to protect the price 30 days by his own statement. If he was not authorized to make prices how could he protect the prices he did make on behalf of the defendant company?

Another letter introduced by the defendant bears date of October 30, 1917, from which I quote as follows:

It is our understanding that your Mr. R. Arias, jr., will have a conference in Panama with Mr. Elder on the subject of future business, and we may be able to come to some equitable conclusion regarding the handling of the kerosene business in Panama, which would be to the mutual interest of all concerned. We are awaiting advice from Mr. Elder on this subject and when we receive such advice we will be governed accordingly.

This was a letter from the defendant company itself at New York to the plaintiff, in which it shows it was in correspondence with its agent, Mr. Elder, relative to the sale of oil and the agency, and states that they were awaiting advice from Mr. Elder on the subject, and states "when we receive such advice we will be governed accordingly"—this would indicate that the defendant company was relying on the acts and representations of its agent, Elder, and conveying the idea to the plaintiff that its agent, Elder, was the man who had authority to negotiate with plaintiff.

Another letter introduced by the defendant bears date of November 13, 1917, which is a letter written by said Elder to the New York office of the defendant company, in which said Elder recommends that the plaintiff company be appointed to represent the defendant company in the city of Panama in defendant's business.

Another letter introduced by the defendant bearing the same date, is a letter from the plaintiff to the defendant company at New York protesting against defendant's refusal to make delivery of the 5,000 cases of oil purchased as alleged in the contract, from which I quote:

We note that you do not feel inclined to fill our order for the 5,000 cases of oil, which Mr. Elder sold to us, most probably, by this time you are in possession of Mr.

Elder's advice, and we can not but think that our order is on the way already.

* * *

The West India Oil Co., when they saw that we were not buying any more oil from them, and, we suppose, because they suspected that we were going to obtain oil from other sources, began to take contracts for long deliveries, of which we immediately acquainted Mr. Elder, and he, after making the necessary inquiries, authorized our Mr. George Arias to effect sales likewise, up to 5,000 cases, which Mr. Arias did, and we then exchanged our letter of the 9th and his reply of the 10th, October, in which it was agreed and accepted, by your authorized agent, Mr. Elder, the sale to us of the 5,000 cases, above referred to.

Now if you do not execute this order, we are going to be greatly inconvenienced, and prejudiced, for we have contracts to fill, which we can not carry out without receiving the oil, and most probably this will bring us legal claims.

This surely goes far in showing the understanding and good intentions of the plaintiff in negotiating with the said Elder as the agent of the defendant company, and further informs the defendant company that if the order is not filled the plaintiff will be greatly inconvenienced and prejudiced because of contracts which the plaintiff entered into for the sale of the oils so purchased from the defendant company. This notice gave the defendant ample time to protect itself against damages which the plaintiff would sustain by refusal of the defendant to fill the orders, as the defendant had the months of January and February in which to fill these orders.

Another letter introduced by the defendant, dated March 4, 1918, written by the plaintiff to the defendant at its New York office, which reviews in detail the entire transaction, from which I quote:

It seems to us, that Mr. Shipman is under the impression that this order was placed by our Don Jorge Arias after he had received cable advice from Mr. Ramon Arias Feraud, jr., that the price of oil had been increased. We wish to tell you most emphatically, that we never received previous advice from Mr. Arias to that effect, and that we placed the order because we had purchased from you 5,000 cases before at the same price, and because in accordance with Mr. Elder, and with his full knowledge, we went to our customers and made sales for future delivery for nearly the 5,000 cases that we purchased from him at the above-mentioned price, \$1.40 less 2 per cent.

Your not having shipped the oil as agreed, and as confirmed by letter by your agent and representative, had not only inconvenienced us, but in order to fulfill those contracts, we have sustained a pecuniary loss, having been compelled to sacrifice our own stock to effect the fulfillment of our pending contracts for delivery of oil.

There is already a pending lawsuit before the courts of the Canal Zone, of a well-known local firm for the very same reason that you have not shipped oil which was sold under those same terms. We were requested to join in that lawsuit, but we have declined to take any legal action against your company, because Mr. Shipman promised to our Don Jorge Arias to arrange that very just matter in a satisfactory manner, and because your Mr. Staley, to whom we have shown all the details of that transaction as well as the contracts which we had to fulfill, is convinced that we are right, and that your company will be fair to us, and because we wish to show you that we were not placing a few obsolete orders with your company, but that it is our most earnest desire to transact future business which will be satisfactory and pleasant to both companies.

The time for the filling of the order of plaintiff alleged in the contract had expired in February, and 4 days after the expiration of the time in which the defendant company should have delivered the oil it is again notified by the plaintiff of the circumstances and the damages, and that the plaintiff company had made sales for future delivery of nearly the 5,000 cases that were so purchased from the defendant, and that the plaintiff company was, in consequence, compelled to sacrifice its own stock to effect fulfillment of pending contracts for the delivery of oil, and calls attention to the representation of other members of the defendant company to the effect that the plaintiff would be protected, and plaintiff again gave the defendant company the opportunity to comply with its contract.

Under the evidence in this case and in view of the authorities herein cited, this court can arrive at no other conclusion than said defendant company is bound by the acts of its agent, Elder, in this contract; that it not only permitted the said Elder to hold himself out as agent and representative of the defendant company with authority to negotiate sales and fix prices, but by statements of its officers at New York and by its own letters held said Elder out as its duly authorized agent.

In view of this evidence and the law, the plaintiff had an absolute right to believe and rely upon the authority of the said Elder to make the contract alleged herein, and the defendant is liable to plaintiff for the damages that plaintiff did sustain by failure of the defendant in fulfilling said contract.

Now I refer to the evidence bearing upon the damages. The contract for the oil as heretofore stated was \$1.40 per case; it is agreed that the price of this oil on the Isthmus in January was \$2.40, and the evidence introduced shows that in February the price on the Isthmus of the oil ranged from \$2.60 to \$2.70 per case.

It will be seen from the evidence that the defendant knew that the plaintiff could dispose of 2,500 or more cases monthly, and that the defendant had the right to deliver this oil during the months of January and February, and it is acknowledged that the plaintiff would need 2,500 or more cases monthly. The equitable and just thing for the defendant to have done would be to deliver 2,500 cases in January and 2,500 cases in February, and it would have had the right to deliver all of it in either January or February; and under the contract if it had delivered the oil in December the oil would have to been stored by the defendant at its own expense until plaintiff desired it for future deliveries.

The defendant not having delivered 2,500 cases in January, 1918, as it knew the plaintiff would need it during that month, in justice to it should reimburse the plaintiff for such damages as the plaintiff sustained in not having the 2,500 cases delivered to it in January.

The defendant having the right to deliver 2,500 cases in February it had the entire month of February in which to deliver the 2,500 cases, and not having delivered it, it in justice should reimburse the plaintiff for the damages which the plaintiff sustained by the non-delivery of the 2,500 cases in February.

The defendant agreed to deliver the oil, f. o. b. New Orleans, and the plaintiff was at the expense of transportation and delivery of that oil from New Orleans to Panama City, which was approximately 50 cents per case, which would make the oil cost delivered in Panama City, \$1.90.

The local selling price in January in Panama City as heretofore shown was \$2.40, which would make a net loss to plaintiff of 50 cents per case, and if we make the calculation on the basis of 2,500 cases which should have been delivered in January, there would be a loss of \$1,250 on the 2,500 cases in January.

The evidence shows that in February the cost to the plaintiff under the contract would be the same as in January, or \$1.90. The prices of the oil in the Republic of Panama during February ranged from \$2.60 to \$2.70, averaging the prices at \$2.65, which seems to be fair for the defendant (because if it had delayed until the last of the month the price would have been \$2.70), the loss to the plaintiff would have been 75 cents per case, or a loss of \$1,875 on the 2,500 cases in February, and for the months of January and February, the total difference in the cost of the oil to the plaintiff and the prices of oil in the city of Panama would amount to \$3,125.

Now, the evidence shows instead of the plaintiff going out after the failure of the defendant to deliver the 2,500 cases in January and buying on the open market, it filled its orders from stock on hand, which it was its habit to hold in reserve for emergency, and the plaintiff did not go out to replenish its stock and to fill its orders which would have been supplied and filled if the defendant had delivered the oil so purchased, until in March, 1918, and was then required to pay a much larger price for the oil because the oil was constantly increasing in price.

If the contract had been explicit that 2,500 cases were to be delivered in January and the defendant had so failed to do, the usual course of business would have been on the part of the plaintiff to have gone into the market and purchased 2,500 cases, the same as plaintiff did do after the expiration of February, but it seemed that the plaintiff was relying upon the defendant performing its part of the contract and deliver the 5,000 cases of oil before the close of February.

Oil having steadily advanced since this contract was entered into, the defendant has made large gains and profits by the nondelivery of the oil under this contract to the plaintiff, and if defendant sold

the oil, the same oil any time after February, 1918, on the market, it would be the financial gainer, even if it pays to the plaintiff the difference between the contract price and the prices so found in January and February, 1918, on the Isthmus of Panama, and this fact has weight with the court in the weighing of the evidence as to the denial on the part of the defendant of the said Elder's authority to bind the defendant company in this contract, and the court is of the opinion that if the price of oil had gone down instead of rising after the execution of this contract, the oil would undoubtedly have been delivered to the plaintiff company by the defendant, and the plaintiff required to pay the contract price of \$1.40 per case, f. o. b. New Orleans and the plaintiff can not be reimbursed for his damages by the defendant paying the plaintiff the difference in the prices in January and February as above shown because the plaintiff during the months of March and April, 1918, as shown by the evidence, was obliged to go into the open market and purchase oil of the West India Oil Company at \$1.87 per case, f. o. b. New Orleans, instead of \$1.40 as per the contract in this case, or a difference of 47 cents per case, f. o. b. New Orleans.

The contract for this oil was consummated October 10, 1917, by the defendant company through its agent, Elder, in which the said Elder stated, as shown by letter of that date introduced in evidence "this will confirm my conversation with Mr. George Arias to-day, accepting your order for second lot of 5,000 cases kerosene in 2/5-gallon tins, same price, \$1.40 U. S. C., f. o. b. New Orleans, same conditions as last lot, to be shipped within 30 days, or during the month of December, we to furnish storage if any part of same required in our warehouse in Chorrillo, or if shipped during January and February, no storage to be furnished," which was again confirmed by the plaintiff's letter of October 11, 1917, to said Elder, and on the succeeding day, October 12th, the plaintiff addressed a letter to the defendant, 17 Battery Place, New York, sending a copy of its letter to said Elder, completing the contract for the purchase.

These negotiations between said Elder and the plaintiff relative to the sale of oil extended over a period from January 4, 1915, and especially from April 28, 1917, and it can be assumed that the defendant company had knowledge of its agent Elder's correspondence and communications with the plaintiff company relative to the sale of oil during all that period of time, as the law requires the agent to keep the principal informed of his acts and negotiations on the principal's behalf. Under the authorities a contract is complete as soon as the letter containing the acceptance is mailed, and corporations are liable to the same extent as natural persons, and corporations are likewise held responsible for the knowledge which is possessed by those

whom they appoint as their representatives, and authorities hold there are peculiar and urgent reasons for more stringent enforcement of the rule against corporations than individual principals from the fact that the only way of communicating actual notice to a corporation is through its agent, and the further rule of law is that the principal upon learning of the unauthorized act of his agent, if the principal does not intend to be bound thereby, he must within a reasonable time repudiate it, and repudiation must be communicated to the other party to the transaction, and not merely to the agent, and if the circumstances are such that silence on the part of the principal would be clouded to mislead the other party, failure to repudiate the act may justify a finding of ratification, and in this case it was the duty of the defendant company, if its agent did not have the authority to make the contract in question and the defendant had not permitted the agent to so hold himself out as having such power, to inform the plaintiff company that it repudiated the contract. An offer to sell goods by mail in the usual course of business without expressly requiring an answer by return mail, must generally be accepted by the mail leaving during business hours on the day in which the offer is received, although not necessarily by the next post, and the question of reasonable time is usually a question of law for the court. In this case the defendant company was negligent and careless, and unreasonably delayed its attempted repudiation of the contract in question, and is estopped now from denying the said Elder's authority to make the contract, and if the defendant's contention is correct that it did not give its agent Elder authority to enter into this contract in question, it is further estopped against the principal and innocent third party because the defendant company not only permitted its agent, Elder, to hold himself out as having authority to make contracts, but by its own letters and conversation with the plaintiff, held the said Elder out as having such general authority, and where a person openly and notoriously exercises the function of a particular agency of a corporation, he will be presumed to have sufficient authority from the corporation to so act, and a principal, who by his conduct, has led an innocent party to rely upon the appearance of another authorized to act for him, will not be held to deny the agency to that party's prejudice, and in many cases the existence of an agency is implied or presumed from the words or conduct of the parties. The maxim of the common law *respondeat superior*, founded upon the principle that a duty rests upon every man in the management of his affairs, whether by himself or by his agent or servants, so to conduct them as to not injure another, and if he does not do so and another is thereby injured, he shall answer for the damage; and the principal will not be

permitted to prove that the agent's authority was, in fact, less extensive than that with which he apparently was clothed; and as against one who is assumed to act as the agent of another, the presumption is that he had authority to do the acts in question; and if an act done by an agent is within the general scope of the authority with which he is clothed, it matters not that it is directly contrary to the instructions of the principal; the principal, will nevertheless be liable.

While the evidence shows the expense of the oil transferred from New Orleans to Panama to be the amount as stated hereinbefore, there arose a question in the discussion of the case, and also referred to during the trial of the case, as to a discrepancy in the amount of the duty which would be paid on the oil in Panama in January and February, 1918, and the parties have agreed in order to save time and expense in the securing of records that to the expense of the oil delivered at Panama there should be added one cent (\$0.01) a case, or \$50. That would make the oil under this stipulation cost the plaintiff \$50 more than the amount heretofore stated, and would reduce the amount of his recovery in that sum, deducting this from the \$3,125 heretofore stated as the loss to the plaintiff, would leave a balance of \$3,075.

The court finds for the plaintiff and fixes its damage at three thousand and seventy-five dollars (\$3,075), with interest at 6 per cent from March 1, 1918.

It is therefore adjudicated and decreed by the court that the plaintiff do have and recover of the defendant the sum of three thousand and seventy-five dollars (\$3,075), with interest at 6 per cent from March 1, 1918, together with plaintiff's cost laid out and expended herein.

BROWN, Administrator, *versus* PANAMA RAILROAD CO.
RICE, Administratrix, *versus* PANAMA RAILROAD CO.
WILLIAMS, Administrator, *versus* PANAMA RAILROAD CO.

(District Court, Canal Zone, Cristobal Division December 4, 1919.)

Civil Nos. 231, 252, 270.

1. NEGLIGENCE. PLEADING COMPLAINT.

It is not enough that plaintiff allege negligence on the part of the defendant.

It must appear in the plaintiff's complaint that a legal duty rested on the defendant at the time and place of the injury which was not fulfilled, and the facts showing the existence of such duty must be alleged and it must appear that in the breach of the duty the defendant was negligent, and that compensable injury resulted from such negligence.

2. NEGLIGENCE. PLEADING COMPLAINT.

A complaint for personal injury in an action brought under the Federal Employers' Liability Law, must contain all necessary allegations of fact making a case for the plaintiff under such law.

Attorney for plaintiffs, *V. G. de Suze*.

Attorneys for Panama Railroad Co., *Feuille* and *Van Dame*.

HANAN, District Judge. By agreement of the parties the demurrers to the complaints in the above-entitled actions were argued and briefed together, owing to the fact that the same substantive principles are involved in each; and that the decision of the court on demurrer to any one of these cases should apply to all of them. Therefore, under this agreement, the court renders the one decision on the demurrer in each case, and this opinion is made in triplicate and filed in each of the cases.

Each of these complaints are brought by either the administrator or administratrix in the estate against the defendant company for damages alleging negligence on the part of the defendant company, and that the decedents in each of the cases were employed by the defendant company at the time of the injury and received injuries causing death while in the performance of their duties as employees of the said defendant company, and in each of the complaints the plaintiff relies upon the Federal Employees' Liability Act and the Federal Compensation Act as giving a right of action to the plaintiffs.

The demurrers filed by the defendant company in each of these cases directed only on specification alleging that in substance the plaintiffs have no cause of action under any law, either the Federal Employers' Liability Act or the laws of the Canal Zone, but the specifications do not reach as to the sufficiency of the pleadings; while under our rule no question can be raised as to the sufficiency of the complaint unless specifications in the demurrer point out the defects, yet, when complaints are so indefinite, uncertain, loosely pleaded, and so insufficient that judgment could not be sustained if rendered, the court deems it its duty to require the complaints made sufficient before passing upon the questions raised by the demurrers, as they are vital questions and lie at the very basis of each cause of action, and therefore, the court will not, at this time, pass on the questions raised by the demurrers except in so far as those demurrers might reach the sufficiency of the complaints, and will reserve any decision on the questions raised by the demurrers filed until the complaints in these actions are amended so as to be sufficient in stating the cause of action. Some of these complaints being so carelessly drawn, and without any consideration whatever as to the requirements under the Federal Liability Act, the court does not feel it to be its duty to point out each defect in the drawing of these complaints

but will state a few general propositions which the counsel for plaintiffs should consider in redrawing the complaints:

It is not enough to charge the defendant with negligent acts, either of commission or omission; but it must also be shown with reasonable certainty that such acts were the direct or approximate cause of the accident or injury; or the complaint must be held bad on demurrer for want of sufficient facts, for an act of negligence unconnected with the injury is necessarily harmless.

The complaint for personal injury through negligence must show a legal duty or obligation of the defendant toward the person injured existing at the time and place of the injury, which the defendant failed to perform or fulfill, and that the injury was occasioned by such failure. A bare allegation of duty is not sufficient; it is mere conclusion of law; it is not traversable, and will not sustain a pleading, it is mere surplusage; but the facts and circumstances from which the duty arises must be set out, and sufficiency of the pleading must be determined from the facts from which the duty is deduced.

In an action to recover for personal injuries under the provisions of the Federal Employers' Liability Act, the defendant must be a common carrier by railroad, and be at the time of the injury, engaged in commerce between the States; the plaintiff must be employed by the defendant in such commerce when injured, and his injury must result from the negligence of the officers, agents, or employees of the carrier or from negligence, defect, or insufficiency in its care, engines, tracks, roadbed, etc., *Lewis vs. Denver etc. Ry. Co.* (1915), 131 Minn. 122, 154 N. W. 945.

It is essential to a case under the statutes of the United States, not only the defendant was at the time engaged in interstate commerce, but also (as the fact might be, the defendant was likewise engaged in transportation within the State), that the plaintiff was at the time the cause of action arose, employed in interstate commerce work. This is settled beyond the necessity of the citation of authorities laying down the rule. *Lucchetti vs. Phila. etc. R. Co.* (E. D. Pa. 1916), 233 Fed. 137.

And the pleadings must show a case within the Federal statute. *Hogarty vs. Phila. etc. R. Co.*, 255 Pa. State 236, 96 Atl. 741.

It must appear that the parties were engaged in interstate commerce. *Wagner vs. Chicago, etc. R. Co.*, 200 Ill. App. 350.

In order to bring a case within the provisions of this act, both the injured party and the carrier must be engaged at the time of the infliction of the injury in interstate commerce, and the pleadings must affirmatively show this fact in order to justify the application of the act. *Ill. Central R. Co. vs. Rogers*, 221 Fed. 52.

To authorize recovery under the Employers' Liability Act of damages by an employee for injury sustained through negligence of a

common carrier, it must be alleged and proved that the injury was suffered while employee was engaged in interstate commerce; it is not sufficient that the carrier in whose service the employee is injured is engaged in interstate commerce. The true test is, is the work or service, in performing which the employee is injured, a part of the interstate commerce in which the carrier is engaged. *Walker vs. Iowa, Central R. Co.*, 241 Fed. 395.

Under the Employers' Liability Act it is not sufficient to simply allege that the defendant is a railroad corporation operating a line of railroad in the Canal Zone, but must allege facts showing that it is engaged in interstate commerce, or decedent was injured while employed by it in connection with such commerce. *Walton vs. Southern R. Co.*, 179 Fed. 175.

A complaint is sufficient which sets forth every condition under which liability arises, and substantially in the language of the statute.

A complaint is sufficient where it alleges in words substantially those of the statute that the defendant was a railroad engaged as a common carrier in interstate commerce, and that the plaintiff was employed by it therein, and that his injury arose while engaged therein from the negligence of the defendant. *Lewis vs. Denver etc. R. Co.*, 131 Minn. 122, 154 N. W. 945.

As to case in which the injury is alleged to occur in one of the territories of the United States, see *Clark vs. Southern Pac., etc., Co.*, 175 Fed. 122.

In order to obtain recovery the plaintiff must stand upon the specifications of negligence set forth in his petition; the purpose of such specification is not to spread a net for the plaintiff, but to enable the defendant to know what evidence it has to meet. The gist of the action, nevertheless, is the negligence of the defendant in whatever form, and not in any particular specification. *Pelton vs. Ill. Central Ry. Co.*, 171 Iowa 91, 150 N. W. 236.

There should, in suits founded on this act, be pleadings affirming pecuniary losses which plaintiffs expect to prove.

The plaintiff's declaration or complaint is vitally defective where it does not positively affirm the pecuniary loss to the beneficiary, and does not set out facts and circumstances adequate to appraise the defendant with reasonable particularity that such loss, in fact, has been suffered. See *Garrett vs. Louisville R. Co.*, 235 U. S. 308, 59 U. S. L. Ed. 242.

As the law does not presume financial loss to a parent from the death of an adult son, it must be alleged; but it seems it must not be alleged that the parents were dependent on the son; but failure to allege pecuniary injury to the plaintiff, if not raised by the demurrer or at the trial, can not be raised at a later stage. *Ill. Cent. R. Co. vs. Porter*, 207 Fed. 311.

There is no basis for a presumption that one dying leaves a husband, widow, children, parent, or next of kin dependent upon him. Absence of allegation to that effect can not, therefore, be supplied by presumption, it must appear in the complaint that such person either was or is, or there is failure to state a cause of action.

When the petition shows the relation of the deponent to the deceased, a general affirmation that the person for whose benefit the action was brought was dependent on deceased and had a pecuniary interest in his life, and suffered pecuniary loss by his death, is sufficient, without setting out in detail the reasons.

A petition should, in case there are children of the dead employee, state how many there were and their age.

The court takes notice of the acts of Congress, and it is to the facts alleged in the petition that it must look to determine whether or not a cause of action is alleged thereunder, and if they do not show cause of action arising under some act of Congress, an averment that they do so arise avails nothing.

The averment alone that "the carrier and its employee were engaged in interstate commerce at the time of the injury to and death of the employee" is insufficient to show such a right under the Federal Employers' Liability Act.

In some of these cases the averment is that the plaintiff, who was administrator, is damaged, he can not be damaged himself and he can not recover for the estate.

The damage to the estate and the measure of recovery therefor are essentially different from a pecuniary loss or injury to dependent relatives because of the death of an employee and the measure of recovery therefor.

In a case founded on an act of Congress, construction given the act, and proceedings thereunder by the Federal courts, are controlling.

Where the injured employee survived the injury for a short time, there may be recovery for pecuniary loss for the widow and children, and also for conscious pain and suffering endured by the deceased.

And, the plaintiff bringing an action under this statute assumes the burden of pleading and proving that at the time he was injured he was engaged in interstate commerce, and the burden of proving negligence is on the plaintiff.

Under the Federal Employers' Liability Act, as interpreted by the Supreme Court of the United States, a new and distinct right of action is given for the benefit of dependent relatives named in the statute. The damages recoverable are limited to such loss as resulted because they have been deprived of reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss sustained. If there is

no reasonable expectation of pecuniary benefit or no financial loss sustained, then there can be no recovery under this act. *Mich. Cent. R. Co. vs. Vreeland*, 227 U. S. 59, 57 U. S. L. Ed. 417. And the pleadings should be framed in accordance with, and keeping in mind constantly the decisions of the Supreme Court, when considering actions under the Federal Employers' Liability Act.

The statute, in so far as it provides for recovery for death, follows the laws of Lord Campbell's Act in England, and its distinguishing feature is identical with the act, it creates a right of action where there was none at common law, and one which is entirely independent of any which the deceased may have had in life, and which come ordinarily to the personal representative by the operation of the statute and not by process of survival. It is one for the exclusive benefit of certain specified persons, and the damages recoverable are such as result to them by reason of having been deprived through the wrongful death of the deceased of the reasonable expectation of pecuniary benefits attendant upon his continuance in life.

Damages recoverable are limited to the financial loss of their being deprived of reasonable expectation of pecuniary benefit by the wrongful death of the employee. *Fogarty vs. Northern Pacific R. Co.*, L. R. A., 1916C, 803.

The Employers' Liability Act contains no direction as to the measure of damages; it authorizes recovery of damages and places no restriction on the amount, and therefore, no limitation is placed, except that of the actual damages sustained. *Devine vs. Chicago, etc., R. Co.*, Ann Cases, 1916B, 481.

But the complaint should allege what pecuniary damages are actually sustained by the next of kin.

The damage sustained by a widow and children are the benefit which might reasonably be expected from the husband and father in a pecuniary way had he lived. And if the complaint does not show pecuniary loss and the basis upon which it is claimed, the defendant is not made aware of the facts upon which the plaintiffs rely for recovery.

The opinion of the Supreme Court of the United States, construing the Employers' Liability Act, or other acts of Congress, is controlling not only upon Federal courts, but State courts as well, for the construction and interpretation of laws of Congress. *Walker vs. Iowa Cent. R. Co.*, 241 Fed. 395.

The Federal law is exclusive within the scope of its operation; it is the same as though they were part of the State law, and it supercedes and takes the place of all State statutes within its scope and field, therefore, in all complaints under this act the pleader must look to the requirements of this law.

The true test as to whether one is engaged in interstate commerce is as follows:

Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it.

All employees who participate in the maintenance or operation of instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce within the meaning of the act. *Montgomery vs. Southern Pac. R. Co.*, 47 L. R. A. (N. S.) 13.

If an employee is not engaged in interstate commerce, the mere fact that he is injured by an interstate train will not bring his case within the Federal Employers' Liability Act.

Employment or work in interstate commerce is not limited or restricted for the purposes of the act to employment or work in actual interstate transportation; its scope includes that, and also work, in the operation and repair of cars, engines, appliances, machinery, tracks, roadbeds, works, boats, wharves, and other equipment actually used in interstate commerce. *McKee vs. Ohio Valley Elec. Co.*, 78 W. Va. 131, 88 S. E. 616. Along this line of employment see also *N. Y. C. R. Co. vs. Winfield*, 224 U. S. 147, 61 U. S. L. Ed. 1045. I also call attention to the plaintiff of *Southern Pacific R. Co. vs. Jensen*, 244 U. S. 205, 61 U. S. L. Ed. 1086, and *Erie R. Co. vs. Jacobus*, 221 Fed. 335. As to employees working on unloading vessels and working on docks and tugs, see *Ill. Cent. R. Co. vs. Porter*, 207 Fed. 311.

Under this act the mere happening of the accident will not warrant a recovery; there must be negligence on the part of the railroad company or on the part of some employee, as this is the basis of the liability. *San Antonio R. Co. vs. Wagner*, 241 U. S. 476.

It is not necessary to show that the injury resulted in whole or in part from the negligence of the officers, agents, or employees of the carrier, or by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. *Long vs. Southern R. Co.*, 155 Ky. 286, 159 S. W. 779; *Cincinnati, etc., R. Co. vs. Goldsten*, 156 Ky. 410, 161 S. W. 246.

The purpose of the Employers' Liability Act was not to render the carrier liable in all instances and under all circumstances where one employee of a carrier is injured by the carelessness and negligence of another. It is not enough that the negligent act causing injury occurred during the existence of the employment, nor is it enough that it occurred during hours the employee is required on duty. To render the carrier liable, the negligence must occur while employees

are doing some act required in the prosecution of the carrier's business. *Van Norstrand vs. Northern Pacific R. Co.*, L. R. A., 1915C, 37.

The employer is not an insurer of the safety of his employee.

There must be an approximate and causal relation between the damages and the negligence of the company. *Chesapeake, etc., R. Co. vs. Carnahan*, 241 U. S. 241, 60 U. S. L. Ed. 979.

The railroad company is not liable to damages under this act for defects, unless the defects were due to its negligence. *Pennsylvania R. Co. vs. Glas*, 239 Fed. 256.

But it is the duty of the carrier to furnish a reasonably safe place for his employees in which to do its work. *Phila., etc., R. Co. vs. Marland*, 239 Fed. 1.

Where a servant is required to work in a dangerous and unsafe place, the master is responsible for any injury he may sustain on account of such unsafe and dangerous condition. *Coal, etc., R. Co. vs. Deal*, 231 Fed. 604.

And the employer must furnish the employee with reasonably safe tools and appliances to work with. *Phila., etc., R. Co. vs. Marland*, 239 Fed. 1.

And while the act abolishes what is known as the "fellow servant doctrine," there is nothing contained therein which changes the rule as respects nonassignable duty of the master to exercise reasonable care in providing the servant with reasonably safe tools and appliances with which to perform the work required of him by the master. *Coal, etc., R. Co. vs. Deal* 231 Fed. 604.

The act does not impose upon the employer absolute responsibility for the safe condition of appliances or work, but limits the responsibility to exercise reasonable care. *Seaboard Air Line vs. Horton*, 233 U. S. 492.

I have now called the attention to a sufficient number of the decisions of the Supreme Court and other courts to challenge the attention of plaintiff's counsel to the fact that if they, the plaintiffs, are entitled to recovery at all under the Federal Liability Act, the complaints must be drawn so as to come clearly within the law.

The complaints are held insufficient, and leave is granted the plaintiffs to amend each of the complaints herein.

SIMPKINS *versus* SIMPKINS.

(District Court, Canal Zone, Balboa Division, December 13, 1919.)

Civil No. 293.

1. DIVORCE. JURISDICTION FOREIGN COURTS; FOREIGN DEGREE. VALIDITY. COMITY.

Defendant brought a divorce action against plaintiff in this court in May, 1918; dismissed such action Sept. 28, 1918; reinstated the same; and on

January 15, 1919, again dismissed such action. He immediately removed to Panama and within a few days thereafter, brought action against the plaintiff in a Panaman court for a divorce. No personal service was made of the process of the Panaman court nor did the plaintiff herein appear in such action. The Panaman court granted the divorce on the complaint of the defendant, June 11, 1919.

Plaintiff brought this action February 3, 1919, March 10, 1919, defendant answered the plaintiff's complaint, Thereafter, in October, 1919, he filed a plea in bar setting up the divorce granted to him by the Panaman court June 11, 1919. The plaintiff answered this plea by alleging that the defendant was never a resident of and had no domicile in the Republic of Panama; that the Panaman court was without jurisdiction to render the decree; that the same was procured by fraud practiced upon the court rendering it; and that the Panaman action was prosecuted in fraud of this plaintiff's rights. Held,

1. That the Panaman decree was rendered because of a clear mistake of law and fact within the provisions of Section 328, subdi. 2 of the C. C. P. of the Canal Zone.

2. That the "domicile" of a person is the place in which he voluntarily fixes his abode, not for a special or temporary purpose, but with the present intention of making it his permanent home; that tested by such rule the defendant had no domicile in Panama; and that the Panaman court had no jurisdiction of the action.

3. That the "full faith and credit" clause of the Federal Constitution does not apply to the judgments of the courts of another nation but only to the States of the United States, and that such recognition as is accorded to foreign judgments rests only on international comity. Such comity will not be recognized or enforced where the foreign law is repugnant to the local law.

4. In a divorce action, in the absence of treaty obligations or statutory requirements, the jurisdiction, proceedings, and judgments of the District Court of the Canal Zone, are not affected by the judgments rendered by the courts of the Republic of Panama. The latter may be repelled by showing lack of jurisdiction, fraud, collusion, or clear mistake of fact or law. (Code, Civ. Pro. p. 71.)

5. That in case the Panaman judgment entry only is offered in evidence, it will be held insufficient to show that the Panaman court had jurisdiction, excepting only where the record or a copy thereof anterior to the judgment can not be produced or obtained. Such entry would be admissible to show the fact of its rendition only. The entire record, if obtainable, should be exhibited, even though the court rendering the judgment is one of general jurisdiction and the entry recites that the court has jurisdiction, so that it can be seen whether in fact the court did have jurisdiction.

[NOTE]. See 271 Fed. 87.

Attorneys for plaintiff, *C. P. Fairman* and *Harmodio Arias*.

Attorneys for defendant, *Stevens Ganson*, *E. M. Robinson* and *Felix E. Porter*.

HANAN, District Judge. On February 3, 1919, the plaintiff filed her complaint in this court against the defendant praying for divorce and for alimony. The complaint alleges that the plaintiff and defendant were duly intermarried on the 21st day of October, 1915, at Cristobal, Canal Zone, and that they lived together as husband and wife until on or about the 20th day of May, 1918, and that on said day the defendant wilfully and absolutely abandoned the plaintiff and has neglected, failed, and refused to resume his duties and relations as the husband of the plaintiff, without just cause of complaint, and has ever since continued in his wilful and absolute abandonment of the plaintiff, and has neglected, failed and refused to contribute to the support of the plaintiff, except when compelled so to do by order of the court; and the plaintiff further alleges that the defendant has been guilty of cruel treatment toward the plaintiff, and has sought by various means to disgrace and humiliate her in the estimation of her friends and the public; and that defendant so conducted himself in private and public as to render domestic peace and harmony impossible; and plaintiff further alleges that the defendant instituted suit for divorce in this court and filed therein his complaint wherein he falsely and maliciously accused the plaintiff of various acts and things of which she was innocent; and that the defendant dismissed the complaint filed in this court after a hearing and the refusal of the court to grant the relief prayed for in his complaint, and that thereafter defendant instituted proceedings for divorce in the courts of the Republic of Panama, with the sole purpose of harassing and humiliating the plaintiff in such a manner as to force her to leave the country; and that the defendant has since that time fraudulently conveyed his property, and has wilfully concealed the whereabouts of his property for the purpose of hindering, delaying, and defrauding the plaintiff of her just claim upon the conjugal property acquired since the celebration of the marriage.

On March 8, 1919, the defendant filed what he denominated a demurrer to the jurisdiction of the court and attached thereto some alleged proceedings in the courts of the Republic of Panama brought by the defendant herein praying for a divorce in the courts of the Republic of Panama; this instrument is in Spanish, and not being translated, this court is unable to give the substance of it. The pleading attempted to raise the jurisdiction of this court to try and hear this case. This pleading not complying with the requirements of a plea in abatement and not alleging facts sufficient to test the complaint on demurrer, the plea was stricken out.

Thereafter on the 10th day of March, 1919, the defendant herein appeared in person and by counsel and the defendant personally subscribed his name to an answer and general denial to the complaint

herein, and same was duly filed in this court, thus closing the issues in this case up to that date.

No proceedings were had in this case, as shown by the records, until October 1, 1919, at which time the defendant appeared and filed what he denominated a plea in bar, in which it is alleged that this court ought not and should not hear and determine this cause for the reason that on June 11, 1919, the defendant was granted an absolute divorce against the plaintiff by the Supreme Court of the Republic of Panama, according to the laws of the said Republic of Panama, to which plea was attached what is alleged to be a translated copy of the judicial proceedings had in said Panamanian court. In this decree the Panamanian court states the plaintiff herein, who was the defendant in that action, lost her rights to the property acquired during the existence of the marital relations formed by the spouses, the plaintiff and defendant herein, and that the "donation" of ten (10) shares which the husband made in favor of the defendant wife in the commercial stock company, the Panama Cocoanut Company, is revoked," and that the plaintiff herein abandoned the defendant; and also found that the plaintiff herein was guilty of cruel and inhuman treatment of the defendant, and further finds that the plaintiff herein has lost all the rights which she might have in the marital union contracted by reason of the marriage, and leaves the husband at liberty to revoke the donations made in benefit of the wife, and that the marriage relations be dissolved; and in this opinion, and in the opinion purporting to be written by the Government attorney, the plaintiff herein is not only deprived of all property rights, either in the community property or the property of the defendant herein, and she is severely criticised, and the entire responsibility for the domestic troubles is placed at the door of this plaintiff; the defendant in this plea has failed to plead the laws of the Republic of Panama which are involved in this proceeding.

On the 29th day of October, 1919, the plaintiff waiving her right to strike out the plea of the defendant, or file demurrer to the same files an answer to the defendants pleadings as denominated "an answer to plea in bar." In this answer the plaintiff denies each and every allegation in the defendant's said answer in bar, and demands strict proof together with all and singular the proceedings had and held as alleged in the said answer in bar, and in further paragraph set out proceedings had by the plaintiff in this court, commenced by the filing of complaint against the defendant herein for divorce on May 24, 1918, No. 236, and each and every step taken in said proceedings until said complaint was finally dismissed, and further alleges that the defendant herein was not a resident and did not have a domicile in the Republic of Panama when he instituted his divorce

proceedings in the courts of that country, and never did secure a *bona fide* matrimonial or personal domicile within the Republic of Panama; and further, alleging that both plaintiff and defendant were citizens of the United States, and residents of the Canal Zone, and that the courts of the Republic of Panama granting said alleged decree of divorce on behalf of the defendant was without jurisdiction of the subject matter and of the parties; that said action brought by the defendant in the courts of the Republic of Panama was solely for the purpose of defrauding the plaintiff of her just claim and demand for support and her legal rights in conjugal property acquired after the celebration of her marriage with the defendant, and by so doing the defendant perpetrated a fraud upon the courts of the Republic of Panama, and attempted to perpetrate a fraud upon this court.

It is further alleged in this plea of the plaintiff that the defendant on February 3, 1919, was possessed of property of a probable value of one hundred thousand dollars (\$100,000), one-half of which property had been acquired since the celebration of the marriage of the plaintiff and defendant; that defendant fraudulently conveyed, secreted, covered up, or otherwise disposed of his property in order to defraud this plaintiff and to prevent any judgment that might or may be rendered by this court in the premises, from being collected; and further alleged that the alleged decree of the courts of the Republic of Panama in said matter are void for want of jurisdiction in said court, and there was want of notice to the plaintiff herein in said proceedings, and the decree was obtained by and through fraud of the defendant herein, etc., and prays that the "plea in bar" filed by the defendant be dismissed.

To this answer of the plaintiff to the defendant's "plea in bar," the plaintiff, on the 13th day of November, 1919, filed an answer and general denial, and demands strict proof by the defendant of her plea.

These issues formed on the "plea in bar" and the answer thereto, and the reply, were submitted to this court for hearing without intervention of a jury, and the cause was heard and oral testimony of the witnesses, and this case being of great importance, not only to the parties in this case, but as to the question of judgments rendered in foreign countries, notice, jurisdiction, and the application of the "full faith and credit" provision of the Constitution of the United States, and of comity, this court has thought it advisable to reduce its opinion to writing, and to not only review the facts and evidence in this case, but the law as applicable to this and like cases in this court, with the hope that this decision may mark a line for future proceedings relative to judgments rendered in foreign countries, and the Republic of Panama especially, and attempted to be set up and pleaded in bar proceedings in this court.

The plaintiff and defendant secured a license from the Clerk of the United States District Court of the Canal Zone, and were duly intermarried on the Canal Zone on October 21, 1915, that the defendant ever since the 12th day of March, 1905, had been a passenger conductor on the Panama Railroad, operating between Panama City in the Republic of Panama, through the Canal Zone into the Republic of Panama, into the city of Colon; that its principal offices are located on the Canal Zone, and that the employees of the Panama Railroad are, and have been for years, granted the right and privilege of furnished dwellings free of rent, light, water, fuel, etc., and that plaintiff and defendant were accorded these privileges and resided on the Canal Zone in a home so furnished, free of rent, etc., until May 24, 1918, when the defendant herein filed his verified complaint in this court for a divorce from the plaintiff herein, and swore that he was a resident of the Canal Zone. Thereafter he was furnished bachelor quarters free of rent on the Canal Zone.

Such proceedings were had in said action brought by this defendant against this plaintiff on May 24, 1918, that the complaint was dismissed on September 28, 1918; thereafter the complaint was reinstated, and on January 15, 1919, the plaintiff secured permission of the court to dismiss the said action in this court, which was accordingly done and the case declared settled.

That immediately after he secured said dismissal on January 15th of his said action in this court, he secured a room in the International Hotel in the city of Panama, Republic of Panama, and that within a few days after the dismissal of said action, he filed his complaint in the courts of the Republic of Panama for divorce against this plaintiff; and at the time of the dismissal of said action in this court he had in contemplation and in progress a divorce action in the Republic of Panama; and that at the time of the filing of said complaint in the Republic of Panama he was not a bona fide resident in the Republic of Panama, but had rented said room in said hotel in the Republic of Panama solely for the purpose of instituting proceedings for divorce in the courts of that country, and that he did not thereafter acquire any bona fide residence in the Republic of Panama, and had no matrimonial or personal domicile within the said Republic of Panama at the time of the filing of his complaint in the courts therein.

That at the time of the filing of the said complaint in the courts of the Republic of Panama, both he and the plaintiff were citizens of the United States, and had their bona fide matrimonial and personal domicile on the Canal Zone.

That as soon as he secured the alleged decree of divorce in the courts of the Republic of Panama, he again returned to the Canal Zone, and has continued to reside on the Canal Zone.

That the defendant herein never intended to acquire or secure a permanent or bona fide domicile within the Republic of Panama at the time of the institution of his said suit in the courts thereof, nor at any time thereafter.

That no personal service was had on this plaintiff in the said suit brought by the defendant in the courts of Panama, and the only pretended service was by means of publication or constructive service.

That at the time of the commencement and pendency of the said action by the said defendant in the courts of Panama, the plaintiff herein was not domiciled within the Republic of Panama, or at any time since the institution of said suit, but at all times claimed her residence to be on the Canal Zone.

That this suit was instituted by the plaintiff on February 3, 1919, and personal service was obtained on the defendant at Ancon, Canal Zone, on the same date.

That on February 20, 1919, the defendant appeared in person and by his counsel in this court and filed a plea in abatement to this action, which, among other things, contained a translated copy of an alleged proceedings had in the courts of the Republic of Panama under date of January 27, 1919, purporting to show attempted service of some kind of notice on this plaintiff while she was temporarily stopping at the Hotel Aspinwall, on the island of Taboga, off the coast of Panama.

That this plea in abatement did not conform to the legal requirements of a plea in abatement, and did not set forth any facts which would bar this action, and the plea in abatement was stricken out.

Thereafter on March 10, 1919, and prior to the time any constructive service in the courts of Panama could have been perfected, the defendant personally appeared in this suit and by counsel, and the defendant personally signed and filed his answer to the complaint of the plaintiff herein, which answer is a form of general denial, and thus submitted himself to the jurisdiction of this court, and closed the issues in this case by the filing of his said answer. At that time an affidavit was on file on behalf of the plaintiff for temporary alimony, and for her expenses employing counsel, and for the prosecution of this action.

That about the middle of April, 1919, the defendant absented himself from the Canal Zone, going to the United States, and not returning until the middle of August, 1919, during all of which time he was not within the jurisdiction of this court.

That on October 1, 1919, the defendant appeared in this court by counsel and filed his plea in bar, to which answer was filed by the plaintiff on October 29, 1919. Annexed to the defendant's plea in bar is a translated copy of an alleged decree made and entered by the

courts of Panama under dates of May 14, 1919, and June 16, 1919, respectively, long after the said date of March 10, 1919, wherein the said defendant had personally appeared and filed his answer, submitting himself and the issues of this case to the jurisdiction of the District Court of the Canal Zone; and it appears from copy of the alleged decree of the court in Panama, annexed to said plea in bar filed by the defendant from the said courts of Panama, the said courts of Panama attempted to adjudicate and deprive the plaintiff herein of her rights and interest in and to certain personal property acquired by her during her marriage relations with the said defendant, to wit: 10 shares of the capital stock of the Panama Coconut Company, a corporation organized under the laws of the Republic of Panama, which capital stock is shown to be of large value, and the said courts of Panama attempted to deprive the plaintiff herein of all right and interest in and to any and all of the property of the defendant herein, and she was by said alleged decree of said Panamanian courts given no alimony or rights in the property of the defendant herein.

The court further finds that the defendant herein many times declared that his said wife should not have any of his property and should never have a dollar of alimony or expense money; that on the date of the institution of this suit, to wit, February 3, 1919, the said defendant was possessed of property, of the value of, and in excess of the sum of forty thousand dollars (\$40,000), a large portion of which said property has been acquired and earned since the celebration of the marriage of the plaintiff and the defendant, was at said time in receipt of an income in excess of \$300 per month.

After defendant herein appeared and filed his answer in said cause, and submitted himself to the jurisdiction of said court, he continued his suit and proceedings instituted by him in the courts of Panama for the purpose of effecting constructive service therein and obtaining the alleged decree of said courts of Panama as heretofore found, which decree is the same decree that he attempts to plead in bar to this action.

The court further finds that the defendant secured dismissal of his action in this court against the plaintiff herein, and prosecuted his suit for divorce in the Republic of Panama solely for the purpose of depriving the plaintiff of her just claim for support and her legal rights in conjugal property acquired after the celebration of her marriage with the defendant, and that he thus perpetrated fraud upon the courts of the Republic of Panama. That in order to secure the courts of the Republic of Panama to assume jurisdiction, the defendant fraudulently represented to the said courts that he was a resident of that country, when, in truth and in fact, at the time of

the institution of said suit, nor at any time thereafter, did said defendant acquire or secure a bona fide domicile within said Republic of Panama. That the said alleged decree of the courts of the Republic of Panama were made and rendered by and through a clear mistake of law and fact, and come within the prohibitions set forth and contained in Paragraph 2 of Section 328 of the Code of Civil Procedure of the Canal Zone.

The court further finds the rights of this plaintiff in and to the property of the defendant herein were not duly safeguarded in the said courts of Panama, and she was not given reasonable protection in her rights in said courts.

The defendant must have had a legal residence or domicile in the Republic of Panama in order to give the Panamanian courts jurisdiction, and the question is very pertinent here as to what is meant in law by the term "domicile." The authorities hold that the domicile of a person is that place in which he voluntarily fixes his abode, and not for a mere special or temporary purpose, but with the present intention of making it his permanent home. A habitation fixed in a place without any present intention of removing therefrom; a residence acquired as a final home; a residence at a particular place, accompanied by an intention, either positive or presumptive, to remain there permanently or for an indefinite length of time; that place in which a man has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home, until some unexpected event shall occur to induce him to adopt some other permanent home; that place where he has a true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.

The authorities hold that no one word is nearly synonymous with "domicile" than "home," and the word "home" admits of no qualification; it is a word which finds its true interpretation in the instincts of our nature. Wherever that spot is found, there the law fixes the domicile of succession.

The word "domicile" is used in many statutes, particularly those relating to the qualification of voters, to homesteads, to taxation, to statutes of limitation, to succession, to guardianship and administration, and to those prescribed in the jurisdiction prerequisites to the maintenance of action for divorce or separation, the term "domicile" has been held equivalent to "residence." It is a settled principle of law that a man can have but one domicile at the same time and one and the same purposes. See 14 Cite, page 833.

As hereinbefore stated the plaintiff and defendant were married in the Canal Zone, and resided on the Canal Zone for the time hereto-

fore stated, and both parties now reside on the Canal Zone, and that the defendant herein never gained a legal residence in the Republic of Panama after he had commenced his action for divorce in the Canal Zone on May 24, 1918, as heretofore stated.

And, it is to be further kept in mind that when the plaintiff herein commenced this action for divorce, February 3, 1919, she secured personal service on the defendant in the Canal Zone on the same day of the filing of her complaint. At that time there was neither personal or constructive service had on the plaintiff in the defendant's suit then pending in the Republic of Panama, and that on February 20, 1919, the defendant filed a plea in abatement to the plaintiff's action, which itself showed that there was only an attempt at service on the plaintiff in the defendant's suit in the Republic of Panama, and that no legal service had then been acquired; that on March 10, 1919, the defendant personally appeared in this court and filed an answer to plaintiff's complaint and thus submitted himself to the jurisdiction of this court.

There are a number of legal proposition involved in these proceedings which are raised by the plea in bar and the answer thereto which we will consider.

The Republic of Panama not being a sister State of the Federal Union, the constitutional provision (United States Constitution, Art. 4, Sec. 1) requiring "full faith and credit" to be given in one State to judicial decrees of another State, does not apply, and there is no law on the Canal Zone requiring the United States District Court of the Canal Zone to give "full faith and credit" to the judicial decrees of the Republic of Panama; this being true, this court would be controlled only by the principles of international comity in passing on the fact of such a foreign decree, and determine whether or not this court will recognize a decree of the Republic of Panama as effectual. See *Howard vs. Strode*, 242 Mo. 210, 146 S. W. 792, An. Cases 1913C, 1057; *Felt vs. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 83 A. S. R. 612, 47 L. R. A. 546; *Buckley vs. Buckley*, 51 Wash. 213, 96 Pac. 1079, 126 A. S. R. 1900.

Public policy is usually held to require a decree of a foreign court that had jurisdiction shall be recognized as fixing the personal status of the parties thereby divorced. Though in England a man who obtained a divorce in Scotland and remarried was convicted of bigamy, and courts have repeatedly refused to recognize foreign decrees when there is a question of acquiring complete jurisdiction. Many decisions in Great Britain and Canada refuse to recognize foreign decrees of divorce obtained by publication against a defendant residing in England or in Canada as the case may be. See *Haddock vs. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 U. S. (L. Ed.) 867,

5 An. Cases 1; as explained in *Thompson vs. Thompson*, 226 U. S. 551, 37 Sup. Ct. 129, 57 U. S. (L. Ed.) 347, 9 Rule in Case Law, 335.

As to the persuasive (but not binding) force of comity, See *Mastfoss & Co. vs. Stoves Mfg. Co.*, 177 U. S. 485, 488, 22 Sup. Ct. 708, 44 L. Ed. 856; *Watts vs. Union Austriaca di Navigazion*, 224 Fed. 188, 192.

Comity will not be exercised where the foreign laws sought to be enforced are repugnant to the local law. Story on Conflict of Law, Section 373.

In Michigan obtaining a divorce in another jurisdiction is itself a cause for divorce, and obtaining a foreign decree does not bar an action for divorce. *Van Inwagen vs. Van Inwagen*, 86 Mich. 332, 49 N. W. 154; *Wright vs. Wright*, 24 Mich. 180.

And the divorce obtained in a foreign country is usually held not to effect the wife's rights in her husband's property not located in that country. 14 Cite 936, note 94; *West Cambridge vs. Lexington*, 1 Pick. (18 Mass.) 505; 11 Am. Dec. 231.

A court of the United States can not have judicial knowledge of the laws of Panama, but such laws are facts to be pleaded and proved. *Stand. F. Co. vs. Holmstrom*, 58 Ind. App. 306, 312; 104 N. E. 872.

In the case of *Panama Electric Company vs. Moyer*, 249 Fed. Rep. 19; *Mes. Natl. R. Co. vs. Slater, et al.*, 115 Fed. Rep. 593, affirmed in 194 U. S. 119, 48 L. Ed. 900; *Liverpool Steam Co. vs. Phoenix Insurance Co.*, 129 U. S. 445, 32 L. Ed. 788, in this last case the Court said: "The rule that the courts of one country can not take cognizance of the law of another without pleading and proof, has been constantly maintained at law and in equity in England and America."

In the Case of the *Panama Electric Company vs. Moyer, supra*, there is quite a full discussion as to the requirement that the laws of Panama shall be pleaded and proved in the District Court of the Canal Zone.

See also *Western Union Tel. Co. vs. Crawford*, 35 L. R. A. (N. S.) 930; *United States Banking Co. vs. Veale*, 37 L. R. A. (N. S.) 540; *Wettlaufer vs. Baxter*, 26 L. R. A. (N. S.) 804; *Southern Express Co. vs. Owens*, 8 L. R. A. (N. S.) 369; *Coleman vs. Lucksinger*, 26 L. R. A. (N. S.) 934.

This court having first acquired complete jurisdiction by personal service on the defendant in the Canal Zone before the Panama court had perfected its constructive service, any authority which the Panamanian court might subsequently acquire by thereafter completing publication of notice to the wife, who is the plaintiff in this action, would not make its judgment based on such constructive service so conclusive in effect as to bar the further prosecution of the wife's action to final judgment, and especially when it is shown to this

court as to the laws of divorce and the organization of courts in Panama as to make it appear that the rights of the wife were not duly safeguarded, and that she did not have reasonable protection in the husband's suit in Panama; she having been accorded no rights in the husband's property by way of alimony or otherwise, and upon the principles of comity this court ought not to give effect to this foreign judgment.

The case of *Haddock vs. Haddock*, 201 U. S. 562, *supra*, as explained in *Thompson vs. Thompson*, 226 U. S. 551, *supra*, furnishes authority for holding that since the plaintiff and defendant were married on the Canal Zone and the husband removed to the Republic of Panama to obtain his divorce, the foreign judgment of divorce rendered in the Republic of Panama on the service of notice by publication, does not bar nor effect the wife's right to recover judgment in her suit upon personal service.

Again, it may be said that in the absence of constitutional limitations, treaty obligations, or statutory requirements, the jurisdiction, proceedings, and decrees of the United States District Court of the Canal Zone is not effected by the judgments or decrees of the Republic of Panama in any action for divorce.

And, in this case the courts of the Republic of Panama never had jurisdiction of the subject matter or of the parties sufficient to render a valid decree, which could be urged in bar of this action for divorce of the same parties in the United States District Court of the Canal Zone; and under the existing laws the judgments and decrees of the courts of the Republic of Panama in action for divorce may be repelled by evidence of want of jurisdiction, want of notice to the parties, fraud, collusion, or clear mistake of law or fact.

Wharton on Conflict of Laws, 3d Ed., Vol. 1, p. 437, states the law of examination for divorce in our courts is as follows: "In view, however, of the important interest at stake, it is proper, when a foreign divorce is set up, that it should be subjected to a close scrutiny; and this scrutiny is the more essential from the carelessness and arbitrariness with which in some jurisdictions divorces are granted, and from the usual *ex parte* character of the procedure. To accept unquestioningly the decrees of foreign states dissolving marriages would be to reduce marriage to a mere sexual union, to be terminated at will. Such is the theory of marriage in nonchristian countries, whose aid, if it were likely to be successful, a short journey might readily secure, in order to vacate a tie from which either party might desire to be relieved. No doubt in such a case an American or English court would say: 'We will allow to such a barbarous decree no extraterritorial force.' "

The Republic of Panama is simply across an imaginary line from the Canal Zone, which makes it very accessible for anyone in the Canal Zone who is desirous of securing a divorce in a foreign country, simply to cross the line, and there being no requirement as to time of residence in the Republic of Panama before commencing suit, it makes it altogether too easy to obtain a divorce, and especially in view of the fact that procedure in the Republic of Panama is a general *ex parte* one, that is to say, there is no public trial of the issues; the parties do not appear before the court at the same time; and the proceedings on behalf of all the parties are in fact and in effect *ex parte*.

While the courts usually recognize judgments and decrees of courts of competent jurisdiction in foreign countries, as stated in *Hilton vs. Guyot*, 159 U. S. 113, 40 L. Ed. 95, "comity of nations is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or others who are under the protection of its laws." Yet there is a marked distinction observed in cases wherein the personal status of the parties is in question, especially is this true in the recognition accorded the decrees of divorce rendered by the courts of a foreign country. Not only are such decrees subject to close scrutiny, but in general they have no conclusive effect upon the proceedings or decrees of the country wherein a decree may be urged in defense or in bar to an action for divorce. Our courts have held "questions of personal status depend on the law of the actual domicile."

The first essential for the validity of a foreign decree is that it should be pronounced by a court of competent jurisdiction between parties who are *bona fide* subjects of that jurisdiction. Any country may fix certain requisites as conditions on which its jurisdiction will be exercised, and if that condition be fulfilled it may pronounce a decree that may be binding within its own territory, but this decree will have no extraterritorial effects unless it be pronounced in accordance with the rules of international public law. No nation will admit that its domiciled subjects may lawfully resort to another country for the purpose of avoiding the laws under which they live. When they return to the country of their domicile bringing back a foreign judgment so obtained, the tribunals of the domicile are entitled to reject it if pronounced by a tribunal not having competent jurisdiction, and are bound to reject it if it be an evasion of their own laws and policy. See note to 19 L. R. A. 515, stating the rule as laid down by Lord Westbury in *Shaw vs. Gould*, *infra*, decided in 1816; and in no event are decrees of a foreign country conclusive in the courts of the United States, whether State or Federal, and the

duty of such courts toward such decrees, and the effect which will at best be given to them is explained in the following language by the Supreme Court of the United States: "All decisions of this court have clearly recognized that judgments of a foreign country are *prima facie* evidence only, and that but for these constitutional and legislative provisions, judgments of a State of the Union when sued upon in another State would have no greater effect." *Hilton vs. Guyot*, 159 U. S. 113, 14 L. Ed. Loc. Cit. 113. And it will be seen under the constitutional provision as heretofore set out that the "full faith and credit" clause of the Constitution is an application only to the judgments and decrees of the courts of the respective States of the Union, and not between one of the States of the Union and a foreign country."

The treaty between the United States and the Republic of Panama contains no obligation and confers no reciprocal rights or duties upon the courts of either country to recognize and enforce judgments and decrees rendered by the courts of the other country; and there is no statutory requirement wherein the courts of the Canal Zone are compelled to recognize the decrees of the courts of Panama, but on the contrary, the judgments and decrees of the courts of Panama may be directly attacked by the courts of the Canal Zone as shown by the laws of the Canal Zone: Section 328 "Effect of other foreign judgment.

The effect of a judgment of any other tribunal of a foreign country, having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.
2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title; but the judgment may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact." Code of Civil Procedure of the Canal Zone, page 71.

The courts of our country look with suspicion upon the decrees of divorce granted by the courts of a foreign country to the citizens of any one of our States, especially when it is made to appear that one or both of the parties are not formally domiciled within the country whose courts have granted such decree. Such decrees are in some respects regarded as infringement or violation of the sovereign power over the rights of its citizens and subjects, and the general rule is to deny to the court of a foreign country jurisdiction of the parties necessary for the rendition of a valid decree of divorce that will be recognized in the country that claims their residence.

The question of domicile pervades all the decisions on this subject; this principle of law is stated as follows: "It is well settled that each State has exclusive jurisdiction over the marriage status of its citizens, and hence a court of another State has no jurisdiction to decree a divorce between parties where neither have a domicile or residence within the State of the *forum*. Accordingly, a divorce rendered by the court of a State in which neither party have a legal residence or domicile, especially where there is no personal service of process upon the defendant within the State of the *forum*, and he or she does not voluntarily appear, is not entitled to recognition in another State under the full faith and credit clause of the Constitution." Ruling Case Law, Section 333, Vol. 9, p. 511, and citing *Bell vs. Bell*, 181 U. S. 175, (45 L. Ed. 804); *Streitwolf vs. Streitwolf*, 181 U. S. 170 (45 L. Ed. 807; *Andrews vs. Andrews*, 188 U. S. 14 (47 L. Ed. 366), and many other cases.

And it is further held that "a court of a foreign country has no jurisdiction to decree a divorce between parties whose legal domicile or residence is in this country, and a decree so rendered will not be recognized in this country as binding upon the defendant who was not served with process in the foreign country and did not appear in the proceedings." Ruling Case Law, Vol. 9, p. 512, citing a number of cases.

And on the "full faith and credit" clause of the Constitution one of the States of the Union will not recognize a decree of divorce granted in another State of the Union unless one or both of the parties have legal domicile within the State where decree was rendered; this being true, it would follow that much less consideration should be given to the decree granted by a court of a foreign country when the domicile and residence is solely for the purpose of obtaining such a decree.

In the case of *Harrison vs. Harrison*, 117 Md. 607, 84 Atl. 57, it is said that for a valid change of domicile there are two requisites, viz., an act, and an intention; * * * a clear definite intent and act done in the execution of that intent.

In the case of *Graham vs. Graham*, 9 N. Dak. 88, 81 N. W. 44, the court held that the word "residence" as used in that statute relating to divorce was construed as equivalent to domicile, and it was held that to satisfy the statute in this respect, the mere bodily presence within the State must be added the present bona fide purpose of abiding there indefinitely as a home.

In the case of *Hinds vs. Hinds*, 1 Iowa 36, the court held that the statute providing for 6 months residence in the State in order to give jurisdiction in divorce proceedings, means, "a legal residence: Not an actual residence alone, but such a residence as that, when

a man leaves it temporarily or on business, he has intention of returning to, and which, when he has returned to, becomes and is *de factor* and *de jure* his domicile, his residence."

It is almost a universal rule that merely going to a State for the purpose of securing a divorce, and residing there the required length of time, but without any intention of remaining there permanently or indefinitely, is held not sufficient to give jurisdiction in divorce proceedings. This is especially true where a divorce is sought on grounds which would be insufficient in the State of the original residence. See *Streitwolf, vs. Streitwolf*, 181 U. S. 179, 45 L. Ed. 807, and cases there cited.

In the case of *Bradfield vs. Bradfield*, 154 Mich. 115, 129 Am. St. Rep. 468, 117 N. W. 588, the Court said: "That in determining whether the complainant was a resident of the State under the divorce law, and in any case where residence is to be determined, the intention, coupled with the acts of the party, must be considered. Intention is always to be given much consideration, but merely claiming intention without acts to support it is not controlling.

In the case of *Mason vs. Mason*, 69 N. J. Eq. 292, 60 Atl. Rep. 337, the Court said: "That under the facts of the case the complainant was entitled to a divorce provided that the court had jurisdiction of her matrimonial status; provided, in other words, that she had not come into the State for the mere purpose of obtaining a divorce, or for the accomplishment of any other present purpose, and had come and had resided there *animus manendi*."

The same authorities hold that "mere residence for the purpose of procuring a divorce has frequently held insufficient to give a domicile within the meaning of the divorce law."

In the case of *Duxstad vs. Duxstad*, 17 Wym. 411, 129 Am. St. Rep. 1138, 100 Pac. 112, the court said: "That a change of residence does not consist alone in going to and living in another place, but it must be with the intention of making that place the permanent residence; a residence once acquired continued until a new one is acquired."

In the case of *Sneed vs. Sneed*, 14 Ariz. 17, 40 L. R. A. (N. S.) 99, 123 Pac. 312, the Court said:

An actual bona fide residence" within the meaning of a statute conferring jurisdiction in divorce proceedings, was considered to mean a person who is in the State to reside permanently, and who, at least for the time being, entertains no idea of having or seeking a permanent home elsewhere.

In the case of *Perkins vs. Perkins*, (Mass.) 113 N. E. 841, 1917B, L. R. A., it is held that the courts of the matrimonial domicile which is retained by a wife innocent of matrimonial wrong, who is deserted by her husband, will not recognize on the grounds of comity a divorce

secured by him in another State without notice to her; and that a decree of divorce entered by the courts of a State other than that of the matrimonial domicile in which plaintiff had established domicile for himself without notice to the defendant, is not within the operation of the "full faith and credit" clause of the Federal Constitution; and that the statute asserting jurisdiction to adjudicate upon the marriage status of those domiciled within the State for a specific time, even as to causes occurring out of its limits and against absent defendants, unless it appears that the libellant came into the State for the purpose of securing a divorce, does not imply as a matter of comity, due recognition of a foreign decree against an innocent wife, which without opportunity for her to be heard, destroyed her marriage statue, although she continued to reside within the State which is the matrimonial domicile of both parties. * * *

In the case of *Bell vs. Bell*, 181 U. S. 175, the Court said:

This was an action brought December 22, 1894, in the Supreme Court for the County of Erie and State of New York, by Mary G. Bell against Frederick A. Bell, for a divorce from the bonds of matrimony, for his adultery at Buffalo, in the County of Erie, in April and May, 1890, and for alimony.

The defendant appeared in the case and pleaded a decree of divorce from the bond of matrimony, obtained by him January 8, 1895, in the Court of Common Pleas for Jefferson County, in the State of Pennsylvania, for her desertion.

The plaintiff replied, denying that the court in Pennsylvania had any jurisdiction to grant the decree, and alleging that no process in the suit there was ever served on her, and that neither she nor her husband ever was or became a resident or citizen of the State of Pennsylvania.

The present action was referred to a referee, who found the facts: The parties were married at Bloomington, in the State of Illinois, on January 24, 1878, and thereafter lived together as husband and wife at Rochester, and afterward at Buffalo, in the State of New York. In August, 1882, the plaintiff went to Bloomington on a visit to her mother. In her absence, the defendant packed up her wearing apparel and other property in trunks, and had them put in the stable, preparatory to sending them to her at Bloomington. In September, 1882, the plaintiff, accompanied by her mother, returned to the defendant's house, stayed there 3 or 4 days and then left, with her mother, for Bloomington; and since then the plaintiff and defendant have not lived together, and she has always claimed her residence as being at Buffalo.

On January 8, 1895, the Court of Common Pleas of Jefferson County, in the State of Pennsylvania, granted to the husband, on his petition filed April 9, 1894, alleging that he was and had been for a year a citizen of that State and a resident of that county, a decree of divorce from the bonds of matrimony for her desertion, which, under the laws of Pennsylvania, was a ground for dissolving marriage. The subpoena in that action was not served upon the wife, but she was served by publication according to the laws of Pennsylvania, and she received through the mail a copy of the subpoena and of a notice of the examiner that he would attend to the duties of his appointment on December 14, 1894, at his office in Brookville in Jefferson County. She did not appear in person or by attorney, and judgment was rendered against her by default.

At the time of the beginning of that action and of the rendering of that decree the wife was a resident of the State of New York, and her husband was not a bona fide resident of the State of Pennsylvania. On January 31, 1894, the husband and his sister presented a petition, upon oath, to the surrogate of Erie County, for the probate of the will of their mother, in which he was described as residing at Buffalo, in the County of Erie, and State of New York. No evidence was offered to show that he actually changed his domicile from New York to Pennsylvania.

The referee also found the husband's adultery as alleged, and reported that the wife should have judgment for a divorce from the bond of matrimony, and for alimony in the sum of \$3,000 during her life, from the commencement of this action, payable quarterly, and for costs. The court confirmed his report, and rendered judgment accordingly for a divorce, alimony, and costs. That judgment was affirmed by the general term and by the court of appeals. 4 App. Div. 527, 40 N. Y. Supp. 443, 157 N. Y. 719, 53 N. E. 1123.

The defendant sued out on this writ of error upon the ground that the judgment below did not give full faith and credit to the judgment in Pennsylvania, as required by the Constitution and laws of the United States.

The case of *Bell vs. Bell* and the case at bar are almost identical in many of the essential points, and the Supreme Court of the United States in affirming judgment of the Court of Appeals of New York rendered in the case of *Bell vs. Bell*, said: "The question in this case is of the validity of the divorce obtained by the husband in Pennsylvania. No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled." The Court further said "upon this record, therefore, the court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other State."

It is further held that in order that the court of a State where the marriage was not celebrated and where the parties had not lived as husband and wife may acquire jurisdiction to decree a divorce which the courts of another State will be required to recognize, the spouse, at whose suit the divorce was granted without personal service upon the other spouse, must have acquired a bona fide residence or domicile within the State of the *forum*. If one of the parties, merely for the purpose of obtaining a divorce, goes to another State, not intending to make it his home, such temporary residence does not confer jurisdiction of the marriage relations. This principle of law is sustained by practically every State in the Union. Ruling Case Law, Section 338, Vol. 9 p. 517, citing *Bell vs. Bell*, and many other cases.

In the case of *Andrews vs. Andrews*, 188 U. S. 314, 47 L. Ed. 366, it was said by the Court: "Each State has exclusive jurisdiction over its citizens covering the marriage tie and its dissolution, and consequently has authority to prohibit them from committing fraud upon the law of their domicile by temporarily sojourning in another State, and there, without acquiring a bona fide domicile, procuring a

decree of divorce." The decree of the State of the *forum* is not conclusive in the courts of the State of the actual residence or domicile of the complainant as to the bona fide domicile or residence of the complainant within the State at the time of the decree. The recital in the proceedings of the jurisdictional fact of plaintiff's domicile may be impeached where the divorce comes in question in another State by intrinsic proof that the plaintiff was not bona fide domiciled in the State granting the divorce.

This being the law as held throughout the Union, how much stronger would be the right to impeach the jurisdictional fact of the plaintiff's domicile where the divorce comes in question in a foreign country, and especially when the laws of the Canal Zone permit such judgment rendered in Panama to be attacked in the matter of want of notice to the party, collusion, fraud, or clear mistake of fact or law.

The question of domicile is often one of intention, but in many cases must not only be intention but accompanied by the necessary act, and the laws of the Republic of Panama have not been so pleaded or proven as to show or make it appear to this court that the rights of the wife were duly safeguarded, and that she had reasonable protection in the suit brought by her husband in Panama, but on the contrary, the decree itself shows that the wife was given no rights, and was granted no alimony or property of any kind or description whatsoever. The evidence shows the husband was possessed of a large amount of property, and no satisfactory explanation has been made in this proceeding as to his disposition of a large proportion of his property. Declarations of the defendant have been shown in this matter that he never intended to give his wife any property and it was seen from his conduct and acts in going to the Republic of Panama and securing a divorce that he is carrying into execution this intention to deprive his wife of any rights which she might secure in his property. A court of equity would hesitate a long time to permit a husband to so deprive of his wife of her marriageable rights in property.

TRANSCRIPT OF JUDGMENT OF THE COURTS OF PANAMA INTRODUCED
IN EVIDENCE IN SUPPORT OF THE PLEA IN BAR IN THIS CASE.

The transcript introduced in evidence does not show service of any kind on the defendant, and does not set out any of the proceedings. There having been no demurrer filed to the plea in bar raising the question of the insufficiency of the transcript, which attempt was made part of the plea, and the trial having been commenced on the plea in bar and the answer and reply, the court permitted the transcript to be introduced in evidence in order to avoid further delay as this case has been pending for some time in this court.

The law is that when a copy of a record is offered in evidence it must contain the whole record; a copy of a part only is inadmissible, as a rule. A judgment entry alone, unaccompanied by any other part of the record or such judgment or no sufficient explanation of its absence, when offered in evidence for purpose other than showing the fact of its rendition, is inadmissible if reasonably objected to. *Clem vs. Meserole*, 44 Fla. 234, 103 A. S. R. 145; *Kenyon vs. Baker* 16 Mich. 373, 97 Am. Dec. 158. In the latter case the defendant introduced only the final entry of the record, without showing any of the previous files or proceedings on which it should have been based. The Supreme Court held this erroneous, and said: "No judgment can be lawfully given by any court until suit has been commenced and the defendants have been brought in and a trial, or default, has been had." Again, the Court said: "No judgment can stand until the jurisdiction of the court appears in some way; and no presumption can arise from an entry which has no previous steps to explain or warrant it." And the court held that the rule is not qualified by the fact that the judgment offered is from a court of general jurisdiction, nor by the fact that it may contain a general recital of jurisdiction; the party is entitled to have the whole record so far as it may concern his former stages, produced because such record is a material part of the judgment, and because he has a right to insist that presumptions applicable to judgment of courts of general jurisdiction, shall be applied only when it is ascertained from inspection of the whole record that it does not affirmatively appear therefrom that the court did not have jurisdiction to render the judgment. General recitals of jurisdiction are, as to many matters, merely conclusions drawn by the court from inspecting other parts of the record proper, and as to which, in case of conflict between the matter of record proper and the recitals, the former will control it. The record proper and the judgment constitute together one entire document every part of which is relevant to the question whether the judgment is a valid one, and the party has a right to insist that every part of that relevant document be submitted." *Clem vs. Meserole*, 44 Fla. 234, 32 So. 815, 103 A. S. R. 145.

The whole record must be introduced where a party intends to avail himself of a judgment or decree as adjudicated on the subject matter, and where it is material for the record to show the jurisdiction of the court rendering the decree. *Little vs. Barlow*, 37 Fla. 232, 20 So. 240, 53 A. S. R. 249; *Mayer vs. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 A. S. R. 196.

A judgment entry alone, unaccompanied by any part of the record or explanation of its absence, is not admissible in evidence except to show the fact of rendition, notwithstanding it emanates from a court

of general jurisdiction and contains general recitals of jurisdiction. *Clem vs. Meserole, supra.*

There is nothing shown by the transcript in this case as to the issues tried before the courts in the Republic of Panama, nor as to the relief prayed, and there is no proof as to the identity of the parties in the transcript and to the parties in this action, and it is the law that where the record is such that the issues in the second suit may not be the same as those decided in the former action, the judgment will not constitute estoppel unless by pleading and proving; the party asserting estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action. *Commercial Publishing Co. vs. Beckwith*, 188 U. S. 567, 47 U. S. (L. Ed.) 598; *Harrison vs. Remington Paper Co.*, 140 Fed. 385.

And the burden of proof that the prior judgment disposed of the identical issues involved in the latter suit rest on him who invokes the doctrine of *res judicata*. *Thompson vs. Washington National Bank*, 68 Wash. 42, 39 L. R. A. (N. S.) 972.

The evidence shows that the defendant, Cordelia Luikart Simpkins, in the suit of Arthur Brooks Simpkins, in the Panamanian court, did not have personal service on her, and she did not appear in the proceedings brought by her husband in the Panamanian courts, and service was had upon her by publication, in that she was not a resident of the Republic of Panama but a resident of the Canal Zone. All proceedings by her husband in the Panamanian courts were done in her absence and without her acquiescence or waiver of any of her legal rights.

The evidence further shows that the defendant herein made an affidavit in May, 1918, that he was a resident of the Canal Zone, and letters were introduced which he had written to his wife thereafter, stating that he was a resident of the Canal Zone and intended to make that his home, and in one of the letters that he was living at the Tivoli Hotel on the Canal Zone, and other letters that he had assigned to him a home on the Canal Zone and intended to live there, and desired the plaintiff in this action to come and live with him, and he never went over to the Republic of Panama until the 18th day of January, 1919, and that within a day or two thereafter, he and his counsel appeared before the Alcalde of Panama and made a declaration that he intended to make his home in Panama, and that on the 25th day of January, 7 days after he went to the International Hotel, Panama, and rented a room, he commenced his action for a divorce, and his counsel, Alberto Marichal, testified that in the latter part of December, 1918, or the early part of January, 1919, the defendant herein consulted with him relative to divorce

laws in Panama, and about his troubles with the plaintiff herein, and thereafter employed him to bring an action for divorce in the Republic of Panama.

The evidence further shows that the only thing which the defendant did to gain a residence in Panama was to rent a room in the International Hotel on the 18th day of January, 1919, and remain there until the middle of April, then go to the United States, from where he did not return until the middle of August, and then remained at his room in the International Hotel a few days and then returned to the Tivoli Hotel on the Canal Zone, and has every since remained there.

The evidence further shows that the Panama Railroad Company, by whom the defendant is employed, furnish quarters free for its employees on the Canal Zone, and the plea in bar as heretofore stated, raised the question of the jurisdiction of the Panamanian courts to render the judgment, copy of which has been introduced in evidence here. The rule is, that the judgment of a foreign court is conclusive is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the person and the subject matter. *Rose vs. Himely*, 4 Cranch 241, 2 U. S. (L. Ed.) 608; *M'Elmoyle vs. Cohen* 13 Pet. 312, 10 U. S. (L. Ed.) 177. And in the absence of jurisdiction over the person and subject matter, the judgment is of no effect. *Bischoff vs. Wethered*, 9 Wall 812, 19 U. S. (L. Ed.) 829; *Grover, etc., Sewing Machine Co. vs. Radcliffe*, 137 U. S. 287, 34 U. S. (L. Ed.) 670. The question of jurisdiction is always open to inquiry. *Thompson vs. Whitman*, 18 Wall 457, 21 U. S. (L. Ed.) 897; *Grover, etc., Sewing Machine Co. vs. Radcliffe*, *supra*. And this is true even if the record in the case recites that the court had jurisdiction. *In re James*, 99 Calif. 374, 33 Pac. 1122, 37 A. S. R. 60. *Marx. vs. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

In the case of *Marx vs. Fore*, *supra*, suit brought upon judgment in another State, the record of which showed the defendant appeared and pleaded therein, defendant set up in answer that he was never served with process in the original action, did not know of the action, and did not authorize anyone to appear for him, and that he had a good defense in such action upon the merits, and the court held this answer was good.

And that court further held that a judgment may be impeached for fraud or mistake, and that courts are in constant habit of relieving parties upon equitable terms from judgments rendered against them in consequence of the fraudulent acts of the successful party or his attorney.

And, "that if judgment is obtained by fraud without jurisdiction, it is no judgment, it is void and will be so declared if the fact is made to appear. The defense goes to its very existence."

The Court in this case further says: "Citizens are not driven to foreign states to protect their rights; if they have a legal right or are being subjected to a wrong, they may look for protection to the tribunal having jurisdiction over them and the subject matter, if the opposing party has placed himself within this jurisdiction."

And for the purpose of impeaching judgment for want of jurisdiction, resort may be had either to the face of the record itself or to extrinsic evidence. *In re. James*, 97 Calif. 374, 37 A. S. R. 60; *St. Sure vs. Lindsfelt*, 82 Wis. 346, 19 L. R. A. 515.

SUIT ON A FOREIGN JUDGMENT.

The judgment sued may be successfully defended by showing he was not served with process, and did not appear in the original suit. *Chicago Title, etc., Co. vs. Smith*, 185 Mass. 363, 102 A. S. R. 350.

And it is well settled, that one who is sued on judgment obtained in a foreign country may be defended on the ground that such judgment is procured by fraud. *Christmas vs. Russell*, 5 Wall 290, 18 U. S. (L. Ed.) 475.

The justice of this rule of law is obvious, for to hold otherwise would be to disregard the well-established rule of law that no man shall take advantage of his own wrong, and would in effect amount to holding that where judgment has been obtained in the courts of one country by a fraud and by a wrongful act, nevertheless the person obtaining it can take advantage of that fraud, and of that wrongful act, and in the courts of another country can enforce the judgment so obtained.

See note to Annotated Cases, 1914, D1,000.

It is further alleged in the answer to the plea in bar that the defendant fraudulently went to the Republic of Panama for the purpose of securing a divorce and of defeating his wife from her marriageable rights in his property. The copy of the judgment rendered in the Panamanian courts showed that the wife received no benefits or interest in the property of her husband, and that certain shares of stock which were given to his wife while they lived together as husband and wife, were attempted to be adjudicated away from her and given back to the husband—this is rather an anomalous procedure, that after a man makes a present to his wife, or gives her property because she is his wife or assisted in earning it, that he can again take it away from her without her consent and without due process of law. This is a strong indication in this Court's mind that the defendant herein in his suit in the Republic of Panama against the plaintiff herein carried out his declaration shown that he never intended to give his wife, the plaintiff herein, a cent.

The wife testified that in 1916 the defendant gave her a list of all his stocks and properties, and requested her to write it on a sheet of paper, which she did with his suggestion, then he read it and examined it and approved of it, and that property amounted to over eighty thousand dollars in value at that time, and since that time the property had greatly increased in value, and that at least half of the property owned by the defendant was accumulated during their married life and while they were living together as husband and wife. The defendant was unable to explain the whereabouts of all this property, but stated he held some of it in trust for other people, and that he had transferred and diverted to a sister a large amount of this property, but he was under no legal obligation to turn any property over to her, but that he had some money of hers to invest, the amount of which he did not know. An attempted explanation made by the defendant as to the disposition of his property is not satisfactory to this court, and the court either had to come to the conclusion that the defendant was entirely unfit to transact any business whatever, or that he was attempting to cover up his property and thus prevent the plaintiff from recovering any share of his property by reason of her marriageable rights. The law is well established that a man can not give away his property to defraud either his creditors or his wife's rights and interest in his property, and the court can not arrive at any other conclusion than that the defendant herein went to the Republic of Panama for the sole purpose of procuring a divorce from the plaintiff herein, and that he never had a legal residence and domicile in the Republic of Panama and that he intended by securing a divorce in Panama, to prevent his wife, the plaintiff herein, from receiving any of his property.

In view of the facts herein stated, and of the law herein quoted, and in justice and equity, the court holds the plea in bar insufficient, and the same is no bar to the pending action, and that the answer to the plea in bar is sufficient and that it has been proven in its main essentials, and that the parties shall proceed to the hearing of the plaintiff's complaint herein and the answer thereto, and judgment shall be so rendered.

UNITED STATES *versus* WILLIAMS.
UNITED STATES *versus* SIMMONDS.

(District Court of the Canal Zone, Balboa Division, January 6, 1921.)

Criminal No. 1701.*

UNITED STATES *versus* SIMMONDS.

(Cristobal Division.)

Criminal No. 1130.

1. PARTIES. CRIMINAL LAW.

The "United States" is the proper party plaintiff in the prosecution of criminal cases in this jurisdiction for a violation of the criminal laws thereof, and not the "Government of the Canal Zone." (Overruled in *Government vs. Livengood*, *infra*.)

District attorney for plaintiff, *A. C. Hindman*.

Attorney for defendant, *L. S. Carrington*.

HANAN, District Judge. This action is one of a large number of charges of burglary in the first degree against the defendant, John Peter Williams; the United States District Attorney has brought this and the other actions by information as there is no provision of law in this jurisdiction for indictment by grand jury in cases of felony.

A demurrer has been filed to the information in the above action alleging in substance that the court is without jurisdiction because of the fact that the information in this case is brought in the name of the United States instead of the name of the "Canal Zone" or "Canal Zone Government." Demurrers setting out this cause have been filed frequently in this court for the past 2 years by counsel in defense of those charged with crimes and the court has overruled the demurrers on this ground in each instance, but has never given a written opinion setting forth explicitly reasons for overruling the demurrers, but has only stated the reasons in general terms orally. This cause for demurrer having been resorted to so frequently and continuously the court has deemed it expedient to now give a written opinion setting forth the court's reasons for overruling such demurrers, and there are a number of criminal cases now pending before the court in each of the Balboa and Cristobal Divisions in which demurrers have been filed raising the same question. This written opinion with the proper caption is now ordered to be filed in each case in the

* The above opinion is the opinion in the case of the U. S. *vs.* Williams. The opinion in the U. S. *vs.* Simmonds is identical therewith except as to the nature of the crime charged.

Balboa and Cristobal Divisions in which this cause for demurrer has been filed; and if the defendants in any of the cases desire an appeal the written opinion shall be embodied in the transcript giving the Court of Appeals the reasons on which the court has overruled the demurrer, and hereafter it will not be necessary for any argument on such causes of demurrer, but that will not prevent any defendant from raising this same question in demurrer and talking advantage of the same on appeal in any other case.

HISTORY.

In the discussion of the status of the Canal Zone in its relations with the United States Government, it may be well to refer briefly and in a general way to the history of its acquisition by the United States.

On June 28, 1902, Congress approved an act authorizing the President to acquire on behalf of the United States, among other things, "perpetual control of a strip of land, the territory of the Republic of Colombia, not less than 6 miles in width, extending from the Caribbean Sea to the Pacific Ocean," and the further right to acquire such additional territory and rights from Colombia as in his judgment will facilitate the general purpose.

After such territory as needed or required was obtained, then the President was authorized to cause to be excavated, constructed and completed a ship canal from the Caribbean Sea to the Pacific Ocean.

And, in said act it is provided that an Isthmian Canal Commission should be created; and it is provided further that the Commission should be in all matters subject to the direction and control of the President; it was the duty of the Commission to aid the President in the construction of the canal and the works appertaining thereto.

On November 3, 1903, a province of Colombia, known as Panama, and through which the said canal was to be constructed, declared its independence from Colombia; and on November 6, 1903, the United States recognized the independence of Panama.

The United States and the Republic of Panama both being desirous to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and the Pacific Oceans, and in furtherance of the Act of Congress, approved June 28, 1902, the United States and the Republic of Panama entered into a treaty on the 18th day of November, 1903. From November 4, 1904, until February 26, 1904, Panama was a sovereign state, and on the latter date when the treaty with the United States was signed, it became a protectorate of the United States, occupying a position similar to that of Cuba.

By Article II of this treaty "the Republic of Panama grants to the United States in perpetuity the use, occupation, and control

of a zone of land under water for the construction, maintenance, operation, sanitation, and protection of said Canal of the width of 10 miles extending to the distance of 5 miles on each side of the center line of the route of the Canal to be constructed; the said Zone beginning in the Caribbean Sea, 3 marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of 3 marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the Zone above described, shall not be included within this grant."

In Article III "the Republic of Panama grants to the United States all the rights, power, and authority within the Zone mentioned and described in Article II of this agreement, and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority."

In Article VI it is provided: "The grants herein contained shall in no manner invalidate the titles or rights of private landholders or owners of private property in said Zone or in or to any of the lands or waters granted to the United States by the provisions of any article of this treaty; * * * ."

Article VI also provides for "a Joint Commission appointed by the Governments of the United States and the Republic of Panama" whose duty it will be to fix the damages caused to the owners of private lands or private property of any kind by reason of the grants contained in the treaty, or by reason of the operations of the United States.

The Act of Congress approved April 28, 1904, entitled "An Act for the temporary government of the Canal Zone and for other purposes," granted to the President of the United States, until the expiration of the 58th Congress, all military, civil, and judicial powers, as well as the power to make all rules and regulations necessary for the government of the Canal Zone, and all rights, power, and authority, granted by the terms of the treaty to the United States, to be vested in such persons and to be exercised in such manner as the President directed for the government of the Canal Zone, and maintaining and protecting the inhabitants thereof in the full protection of their life, liberty, and religion.

The President of the United States, in conformity with the above-mentioned Act of April 28, 1904, and Article VI of the treaty, appointed a commission known as the Isthmian Canal Commission, which was to have charge of the construction of the Panama Canal,

under the direction and control of the President; and he addressed a letter, dated May 9, 1904, to the Secretary of War, by the terms of which the direction of Canal affairs was placed under the latter official, and authority was granted to the Commission to enact legislation for the Canal Zone. In assigning duties to the various officials of the Panama Canal, the President, in the said letter, among other things, laid down the following rules:

The inhabitants of the Isthmian Canal Zone are entitled to security in their persons, property, and religion, and in all their private rights and relations. * * *

The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone and in other places on the Isthmus over which the United States has jurisdiction until altered or annulled by the said Commission, but there are certain great principles of government which have been made the basis of our existence as a nation which we deem essential to the rule of law and the maintenance of order, and which shall have force in said Zone. The principles referred to may be generally stated as follows:

That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required nor excessive fines imposed, nor cruel or unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or of the rights of the people to peaceably assemble and petition the Government for a redress of grievances; that no law shall be made respecting the establishment of religion or prohibiting the free exercise thereof."

(P. 33 and 34 of First Annual Report of the Isthmian Canal Commission.)

Again, on October 18, 1904, the President addressed a letter to the Secretary of War, which reads in part as follows:

By Executive Order of May 9, 1904, I placed under your immediate supervision the work of the Isthmian Canal Commission, both in the construction of the Canal and in the exercise of such governmental powers as it seemed necessary for the United States to exercise under the treaty with the Republic of Panama in the Canal strip. * * * Least of all do we desire to interfere with the business and prosperity of the people of Panama. However far a just construction of the treaty might enable us to do, did the exigencies of the case require it, in asserting the equivalent of sovereignty over the Canal strip, it is our full intention that the rights which we exercise shall be exercised with all proper care for the honor and interests of the people of Panama. * * *

The President's instructions contained in the two letters above mentioned had the force of laws, as they were issued by him under the broad powers conferred by the Act of Congress of April 28, 1904,

already mentioned. Any doubt as to the validity of those instructions was removed by Section 2 of the Act of Congress approved August 24, 1912, entitled "An Act to provide for the operation, maintenance, and protection of the Panama Canal and the government and sanitation of the Canal Zone, known as the Panama Canal Act," which expressly ratifies as valid and binding the laws, orders and regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal.

In pursuance of Article VI of the treaty, and the said Executive Orders and Laws, a commission was appointed; all land owners or those having any interests in the lands or property embraced or included within the Zone made proof before the commission, known as the Joint Commission, as to the value of their lands or property, and the Commission awarded compensation to the claimants, and then required all landowners and property owners within the Zone to remove from the limits of the Zone and from their property; the United States Government thereby became owner of all lands within the Zone; and to-day, not only all the land within the Zone is owned by the Government, but all buildings and improvements of every kind and description is the property of the Government; and the business on the Zone is conducted by the Government, either directly, or through the Panama Railroad Company, a corporation of New York, practically all the stock of which is owned by the Government, and no person or corporation has any right or authority to establish himself or itself upon the Zone, or to transact any business on the Zone except by special permit from the Government; and it follows, that the Government not only by treaty acquired the territory embraced in the Zone, but by purchase from the landowners owned in fee all the lands situated therein.

By the Act of Congress of April 28, 1904 (c. 1758, Sec. 2, 33 Stats. 429), temporary powers of government over the Zone were vested in such persons and was exercised in such manner as the President should direct. An Executive Order of the President addressed to the Secretary of War on March 8, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage: "The laws of the land, with which the inhabitants are familiar and which were in force on February 26, 1904, will continue in force in the Canal Zone * * * until altered, or annulled by the said Commission; with power to the Commission to legislate subject to approval by the Secretary." This was construed to keep in force the Civil Code of the Republic of Panama which was translated from Spanish into English by the Isthmian Canal Commission in 1905.

By the Act of Congress of August 24, 1912 (c 390, Sec. 2, 37 Stats. 560, 561), "all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

On December 5, 1912, acting under authority of the above mentioned Act of August 24, 1912, Section 3, the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal, and directed the Chairman of the Isthmian Canal Commission to take possession of it, with provisions for the extinguishment of all adverse claims and titles.

The Canal Zone at the present time is peopled only by the employees of The Panama Canal, the Panama Railroad Company; and steamship lines, cable company, and oil companies, permitted to do business in the Zone under license.

The President's Order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law.

On August 24, 1912, Congress passed an act providing for the permanent government of the Canal Zone. Section 7 provided that the Canal Zone is to be held, treated, and governed as an adjunct of the Panama Canal. Section 8 of the act provides: "That there shall be in the Canal Zone one district court with two divisions, one including Balboa and the other including Cristobal; and one district judge of the said district, who shall hold his court in both divisions at such time as he may designate by order, at least once a month in each division. The rules of practice in such district court shall be prescribed or amended by order of the President. The said district court shall have original jurisdiction of all felony cases, of offenses arising under Section 10 of this act, all causes in equity, admiralty, and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' courts. The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same that is exercised by the United States District Judges and the United States District Courts, and the procedure and practice shall also be the same. The district court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District of the Canal Zone, or the judges thereof."

This section also provides that "there shall be a district attorney and a marshal for said district. It shall be the duty of the district

attorney to conduct all business, civil and criminal, for the Government, * * * .”

This section provides that “The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, * * * .”

This same section also provides that “the district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assistant when necessary, who shall receive salaries to be fixed by the President.”

This section also provides: “During his (the district judge) absence, or during any period of disability or disqualification from sickness or otherwise to discharge his duties, the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President, and who, during such service shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding court away from their homes.

Section 9 abolishes the then existing Canal Zone courts and transfers all the business to the district court provided under this act. This section also provides: “All existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice and procedure in the new courts.”

This section also provides: “The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charge is punishable as a felony.”

Section 12 grants jurisdiction to the District Court of the Canal Zone over the laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, and provides that for such purpose and for such purposes only the Canal Zone shall be considered and treated as an organized territory of the United States.

Section 13 provides that in time of war in which the United States shall be engaged, or when in the opinion of the President war is imminent, the President may appoint an officer of the Army to assume

and have exclusive authority and jurisdiction over the Panama Canal, including the entire control and government of the Canal Zone, and during which time the Governor of the Canal Zone is made subject to the orders and direction of such officer of the Army.

Section 14 provides: "That this act shall be known and referred to as, The Panama Canal Act, and the right to alter, amend, or repeal any or all of its provisions or to extend, modify, or annul any rule or regulation made under its authority is expressly reserved."

On January 27, 1914, the President issued an Executive Order to establish a permanent organization for the Canal Zone effective from and after the first day of April, 1914, and providing that from said date the Isthmian Canal Commission, together with the organization for the Panama Canal at that time, should cease to exist, in accordance with Section 4 of The Panama Canal Act; the said section provides that the President shall thereafter govern and operate the Panama Canal through a governor and such other persons as he may deem competent to discharge the various duties incident to such work.

The questions now before the court primarily concern the powers of the Federal Government over the government of such territories as are subject to its sovereignty but not embraced within the boundaries of any State; this Federal authority has been derived from two sources:

1. The express power given to Congress to dispose of and make all needful rules and regulations respecting the territories or other property belonging to the United States.

2. The implied power to govern, derived from the right to acquire territory.

Both of these sources have been recognized by the Supreme Court of the United States. In *Sere vs. Pilot*, 6 Cranch. 332, decided in 1810, Chief Justice Marshal, after referring to the foregoing source of authority, said:

Accordingly we find Congress possessing and exercising absolute and undisputed power of governing and legislating for the Territory of Orleans.

Not only has there never been any serious dispute as to the power of the National Government to govern all territories subject to its sovereignty and not included within the boundaries of any of the several States, but with equally unanimous assent this power has been held to be practically absolute; that is to say, the power of government which shall be erected over these territories and the extent to which their inhabitants shall be permitted to participate in this government is recognized to rest wholly within the discretion of the President and the Federal lawmaking power.

In *Mormon Church vs. United States*, 136 U. S. 1, the Supreme Court said:

The power of Congress over the territories is general and plenary.

In *National Bank vs. County of Yankton*, 101 U. S. 129, Chief Justice Waite, speaking for the court, said:

All territory within the jurisdiction of the United States not included in any State must, necessarily, be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the General Government that counties do to the States, and Congress may legislate for them as States do for their respective municipal organizations. * * * Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States.

The Panama Canal Zone is not, in a strict sense, an organized territory of the United States; Section 10047, U. S. Comp. Stats. 1916, stating for the purposes of extradition "and such purposes only the Canal Zone shall be considered and treated as an organized territory of the United States." The Attorney General of the United States has described it as "a place subject to the use, occupation, and control of the United States for a particular purpose, to wit, the construction and maintenance of a ship canal connecting the waters of the Atlantic and Pacific Oceans." (27 Op. Atty. Gen. 594. 1909.)

Section 3 of the treaty with the Republic of Panama states that Panama "grants to the United States all the rights, power and authority within the Zone mentioned and described in Article 2 of this agreement, which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority." (*Wilson vs. Shaw*, 204 U. S. 24, 33.)

There being no organized territory, there could be no territorial government against which crime could be committed. The only operating and controlling government within the Zone is therefore the United States.

Even in the case of organized territories, the Supreme Court has recognized that the logical procedure is for indictments and information to be in the name of the United States. In *Snow vs. U. S.*, 18 Wallace 317, 321, the Court said:

Strictly speaking, there is no sovereignty in a territory of the United States but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses. But the practice has been otherwise, not only in Utah, but in other territories organized upon the same type.

The practice here referred to is, apparently, that of allowing the local territorial officer to prosecute offenses.

Elsewhere the Court said: (Pp. 319-320).

The government of the territories of the United States belongs, primarily, to Congress; and secondarily to such agencies as Congress may establish for that purpose. During the term of their pupilage as territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

In *Morman Church vs. U. S.*, 136 U. S. 1, referring to the power of the United States over territory acquired by treaty, the Court said:

Having rightfully acquired said territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government, had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident.

In *Jones vs. U. S.*, 137 U. S. 202, defendant committed murder on Navassa Island, in the Caribbean Sea, outside of the jurisdiction of any State or district of the United States. An act of Congress made murder punishable with death when committed "in any other place or district or country under the exclusive jurisdiction of the United States." The prosecution was in the name of the United States. The right to so prosecute seems not to have been questioned.

The Court in sustaining the jurisdiction of the trial court, said:

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.

Congress having exercised its rights over the Canal Zone and the President, by executive orders, having done likewise, the political question of sovereignty has thus been finally settled:

That the sovereignty whose law has been violated in this instance is the United States, and not the Canal Zone as a political entity, see U. S. Compiled Statutes, 1916, Section 10445, providing that "the crimes and offenses defined in this chapter shall be punished as herein prescribed. * * *

Third: When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof * * * ." Murder is a crime included in that chapter of the code. (Sec. 10448.)

That the above conclusion accords with the construction placed upon the Acts of Congress by the Department of Justice, see 26 Opinions Attorney General, 113, 116, where it is stated:

* * * The United States, acquired in perpetuity "the use, occupation and control" of the so-called Canal Zone, and also "all the rights, power, and authority within the

Zone mentioned * * * which the United States would possess and exercise if it were the sovereign of the territory." Unquestionably these provisions of the treaty imposed upon the United States the obligations as well as the powers of a sovereign within the territory described, and it is no less obvious that among these obligations was that of providing a government for the territory in question for the purpose, in the language of the second section of the Act of Congress approved April 28, 1904, of "maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion."

It being, therefore, the duty of the United States to provide a government for the territory over which its control, with all the incidents of sovereignty was established by the terms of the treaty, in the absence of any provision by Congress to effect this object, the President would be authorized and obliged by his duty as executive head of the Nation under the Constitution to discharge the obligation thus resting upon the Nation; and if Congress had taken no action whatever on the subject, the right of the President to thus administer the territory controlled by the Nation would not be open to question. In fact, however, Congress by the first section of the act above quoted, authorized the President "to take possession of and occupy on behalf of the United States" the territory generally known as the Canal Zone, and covered by the terms of the treaty. This authority to take possession of and occupy would, of itself, imply the authority to govern in so far as government was needful to secure the safety and welfare of the inhabitants of the territory occupied.

At page 118, *supra*:

In the absence of action by Congress distinctly denying him that right and establishing by law a state of anarchy in the Canal Zone, the President would have the power to administer this territory, merely because control, with the incidents of sovereignty over it, was possessed by the United States, and no other provision for its orderly government has been made.

The conclusions from the foregoing are:

1. The only sovereignty within the Canal Zone is now the United States of America;
2. The laws operative therein are, by express enactment, executive order or implied adoption, laws of the United States;
3. A violation of the criminal law governing murder, or any other felony, in force in the Canal Zone, is an infraction of a law of the United States, and an information in its name would be proper.

HOW CONGRESS REGARDS THE CANAL ZONE.

The Congress of the United States, which enacted the Canal Zone Act of 1912,¹ and created the present court on the Canal Zone, has in at least one instance given its creature a name. In the Espionage Act, approved June 15, 1917, under Title VI, under the subject of "Seizure of Arms and other Articles Intended for Export," Section 2, Congress makes use of the following language:

It shall be the duty of the person making any seizure under this title to apply with due diligence, to the judge of the District Court of the United States, or to the Judge of the United States District Court of the Canal Zone.

It will be seen that Congress refers to the court of the Canal Zone the same as it refers to all United States district courts in the States, simply using the words "District Court of the United States," but in referring to the judge, Congress uses the words: "Or to the judge of the United States District Court of the Canal Zone."

There is only one district court on the Canal Zone, and that is the court created by the Canal Zone Act of 1912. There is no Judge of any other court on the Canal Zone.

It must be assumed that Congress knew what kind of a court it has provided for on the Canal Zone in the Canal Zone Act.

If there is no judge of the United States District Court of the Canal Zone, then how would it be possible for any person making any seizure under the Espionage Act to apply to the "judge of the United States District Court of the Canal Zone" for a warrant to justify the further detention of property so seized?

ALIAS FOR THE UNITED STATES.

Even if Congress had provided that all criminal acts committed within the jurisdiction of the Canal Zone should be commenced in the name of the "Canal Zone" or "Canal Zone Government," the "Canal Zone" or "Canal Zone Government" would simply be an alias for the United States, because the United States is the only sovereignty, and there is no sovereignty in the "Canal Zone" or the "Canal Zone Government," and even then informations filed in the name of the United States would not be error, because the United States would be the principal and the only sovereignty. It would result in simply authority or permission given or authorized by Congress to use the terms "Canal Zone" or "Canal Zone Government" as the agent of the United States, or an alias of the United States.

In the past certain cases have been cited to me in support of the contention that the criminal actions should not be brought in the name of the United States, and at least one of these cases has been used by other parties who have interested themselves in the title of the criminal actions brought in my court. One of these cases especially relied upon by some of the lawyers is that of *Ex parte Gon-Shay-ee*, 130 U. S. 243; this case is not authority for objection to the practice in the Canal Zone of laying prosecutions in the name of the United States. Those who have cited it and relied upon it so strenuously either have never carefully read it or if they have they have been unable to distinguish the case and understand what was really decided in that case. I have deemed it expedient to discuss this case with a number of other cases cited and distinguish the cases, and also call attention to certain additional cases which support the

proposition that the procedure now followed by the United States District Attorney in the Canal Zone in the title of criminal actions is legal and the proper procedure.

And, in this discussion of authorities I endeavored to point out the distinction recognized by the courts between United States courts created by Congress in pursuance of the judicial clause of the Constitution and the United States courts created by virtue of the power vested in Congress to govern territories of the United States, and this will involve a discussion of Section 1 of Article III of the Constitution, which must be kept in mind continuously when reading the cases; and where the courts in these cases use the phrase "courts of the United States" such statements are subject to the qualification "within the meaning of the Third Article of the Constitution," or "within the meaning of the Judiciary Act passed in pursuance thereto."

We must also keep in mind in reading and discussion of these cases the fact that though the territorial courts exercise a peculiar jurisdiction and are created for the territories, that does not change their character as courts of the United States; and, too we must not forget the fact that the Canal Zone is not an organized territory of the United States, but bears relationship to the United States peculiarly different from organized territories.

STATUS OF THE UNITED STATES COURTS.

A distinction, of course, is recognized between United States courts created by Congress in pursuance of the judicial clause of the Constitution and United States courts created by virtue of the power vested in Congress to govern the territories of the United States. In distinguishing the two, Chief Justice Marshall in *American Insurance Company vs. 356 Bales of Cotton*, 1 Pet. 511, spoke of the former as "constitutional" courts and of the latter as "legislative" courts. Both classes of courts are constitutional courts in the sense that Congress created them by virtue of constitutional provision, but the territorial courts are not such as are contemplated by Section 1 of Article III of the Constitution. As was explained by the Chief Justice in *American Insurance Company vs. 356 Bales of Cotton*, *supra*: "These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the Third Article

of the Constitution, but is conferred by Congress in the execution of those general powers which that body possess over the territories of the United States."

In the case of *McAllister vs. United States*, 141 U. S. 174, a like distinction, with reference to tenure of office, is made between the two classes of courts. In that case it appears that President Cleveland, under the provision of the Tenure of Office Acts of 1867-69, removed from office the Judge of the District Court of Alaska; and the question before the court was whether such judge came within contemplation of the provision of the statute excepting "judges of the courts of the United States." Following the distinction made by Marshall, C. J., in *American Insurance Company vs. 356 Bales of Cotton*, *supra*, the court held that the exception of the statute was made with reference to this recognized distinction and was not intended to include judges of legislative or territorial courts. It is true that in the opinion the Court speaks of the distinction between "courts of the United States" and "merely territorial or legislative courts;" but it is clear from the context that the phrase "courts of the United States" is used for the purpose of the distinction and with the same meaning that Chief Justice Marshall made use of the designation "constitutional courts" in distinction to "legislative." Thus, quoting from the opinion in *The City of Panama*, 101 U. S. 453, the Court says: "courts of this kind are not in strictness, courts of the United States, or in other words the jurisdiction with which they are invested is not a part of judicial power defined by the Third Article of the Constitution, but is conferred by Congress in the execution of the general powers which the legislative department possesses to make all the needful rules and regulations respecting the public territory and other public property." And again, in referring to *American Insurance Company vs. 356 Bales of Cotton* and other earlier cases reviewed, the Court says: "These cases close all discussion here as to whether territorial Courts are of the class defined in the Third Article of the Constitution. It must be regarded as settled that courts in the territories created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States created under the authority conferred by that Article."

The *American Insurance Company* case and the *McAllister* case are conclusive merely on the proposition that the jurisdiction with which legislative courts are invested is no part of the judicial power defined by the Third Article of the Constitution and that the judges of such courts are not "judges of courts of the United States," within the meaning of Article III of the Constitution. Thus, in granting a writ of prohibition to the District Court of Alaska, the Supreme

Court in *Ex parte Cooper*, 143 U. S. 472, said: "Although we were of opinion when the application for the rule was made, and subsequently held in *McAllister vs. United States*, 141 U. S. 174, that the District Court for Alaska was not one of the courts mentioned in Article III of the Constitution, declaring that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as Congress shall from time to time establish, we nevertheless concluded that where the District Court of Alaska was acting as a District Court of the United States and, as such, proceeding in admiralty, it came within that section (Sec. 688 Revised Statutes) and this court had power to issue the writ of prohibition to that court in a proper case."

It is clear that the cases cited, *supra*, are not authority for the proposition that a court created for a territory, is not a United States court. As was said by Mr. Justice Field, in his dissenting opinion in the *McAllister* case, in reviewing *American Insurance Company vs. 356 Bales of Cotton*: "All this decision affirms is that the judges of these courts do not derive their existence from the Constitution, for if they do, they would hold their office during good behavior for life, and the term of it could not be otherwise limited by Congress. Similar language is also found in other cases, some of which are cited in the opinion of the court, but this does not show that they are not courts of the United States though created for the territories. The fact that they exercise a peculiar jurisdiction and are created for the territories, does not change their character as courts of the United States." So in the case of *Hunt vs. Palao*, 45 U. S. (4 How.) 589, in speaking of a court of the Territory of Florida, Chief Justice Taney said: "The Territorial Court of Appeals was a court of the United States and the control of its records therefore belongs to the General Government." So in *Ex parte Gon-Shay-ee* 130 U. S. 343, the Court in stating the case uses this language: "This is a petition for a writ of *habeas corpus* to be directed to the Marshal of the United States for the Territory of Arizona, who, it is alleged, holds the petition under a judgment of the District Court of the United States for the Second Judicial District of that Territory.

An analysis of the decisions will make plain that where statements were made therein to the effect that legislative courts are not "courts of the United States," such statements are subject to the qualification "within the meaning of the Third Article of the Constitution or "within the meaning of the Judiciary Act passed in pursuance thereto." Thus in *Hornbuckle vs. Toombs*, 18 Wall. 648, in holding that the practice of territorial courts, as well as their respective jurisdictions, should be governed by the legislative action of the territory, the Court said: "The Acts of Congress respecting proceedings in the

United States courts are concerned with and confined to those courts considered as parts of the Federal system, and as invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments.

In stressing this same distinction, the Court in the course of its opinion in *Clinton vs. Englebrecht*, 13 Wall. 434, remarks: "There is no Supreme Court of the United States nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah." The qualifying phrase, of course, is vital to the meaning of this sentence; for it would scarcely be contended that the Supreme Court ceased to function as a court of the United States when it assumed jurisdiction on appeal of the case of *Clinton vs. Englebrecht*. In like manner, a similar qualification is fairly to be read into any statement by the Supreme Court that gives color to the assertion that the district court for a territory, is not a United States court. As was said by Justice Field in his dissenting opinion in the *McAllister* case, "the fact that they exercise a peculiar jurisdiction and are created for the territories, does not change their character as courts of the United States."

The Panama Canal Act of 1912 provides: "There shall be in the Canal Zone one district court." No significance can be attached to the fact that in creating the court, Congress does not designate it a "United States" district court. No such designation is made by Congress in creating district courts for the various districts in the United States, nor in providing that a district judge shall be appointed for each district. In fact one of the few instances I have noted of the use of the designation, is in the Act of March 3, 1913, relating to Alaska, in which Congress refers to the "United States district judges in Alaska." Yet the provision creating the court merely reads: "There is hereby established a district court for the District of Alaska." Congress clearly goes upon the assumption that a court of its creation is necessarily a United States court and the judge thereof a United States judge. There existed at the time of the passage of the act a "District Court of the Canal Zone" which was abolished by the act, and from which it may be assumed the newly created district court was to be distinguished. It is clear that it was not the intention of Congress merely to continue the existence of the "District Court of the Canal Zone," and there is nothing to indicate that the new court should bear the same designation. Section 9 of the act provides that the Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, modify or affirm the final judgments and decrees of the District Court of the Canal Zone; and Section 8 of the act provides that in the event of disability of the

judge, his duties shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President. It seems scarcely necessary to observe that Congress would not have provided for this transfer of judges if it did not consider that the court which it had created was a United States court. Jurisdiction in admiralty corresponding to that of district courts in the United States is conferred upon the District Court for the Canal Zone. So, in the Espionage Act of 1917, the District Court of the Canal Zone is given concurrent jurisdiction with the district courts of the United States of offenses committed under the act, either within its district or upon the high seas. Here, it seems plain that the description of the courts as the district courts "of the Canal Zone" and district courts "of the United States" is clearly for the purpose of geographical rather than of judicial distinction, and neither the descriptive phrase "of the United States" nor the descriptive phrase "of the Canal Zone" can be construed as a part of the entitlement of the court so described. The judge of the court is appointed by the President, by and with the consent of the Senate.

The marshal and the attorney for the district are respectively commissioned United States Marshal and United States District Attorney. It may be added that use of the descriptive phrase "of the Canal Zone" as part of the official entitlement of the district court would be accurate only if the court had been created and invested with jurisdiction by a legislative enactment of territorial government. Such entitlement however, is clearly inaccurate and misleading when applied to a court-created for the Canal Zone by direct act of Congress in language similar to that used in the creation of district courts for the various districts of the Continental United States.

In view of the jurisdiction of the district court, which is Federal as well as municipal in character, it would seem that the President exceeded neither the law nor the proprieties in designating the judge thereof a United States Judge; and in view of the latter's commission from the President as "United States District Judge, District of the Canal Zone," it seems proper for him to designate his court the "United States District Court in and for the Canal Zone."

PROSECUTION IN THE NAME OF THE UNITED STATES.

In the case of the original continental territories, the organic acts created governments analagous to those of the States, and in the case of their courts much the same distinction as exists in the States was made between the Federal and municipal jurisdiction. The territories, however, were not sovereign, and it therefore seems

to have been the practice to prosecute for crime in the name of the United States, notwithstanding that the crime itself had been defined by the territorial legislature and constituted a violation of the criminal code of the territory.

A United States court for a territory exercised frequently a double jurisdiction and possessed a dual capacity. As was said by the Court in *U. S. vs. Pridgeon*, 153 U. S. 58, "the courts created for the Territory of Oklahoma are clearly dual in nature. They sit as territorial courts to administer the laws of the territory and as courts of the United States to administer laws of the United States." So, in Arizona, at certain periods the district court, under the statute, assumed jurisdiction of cases arising under the Constitution and laws of Congress, and at other times of cases arising under laws enacted by the territorial legislature. The procedure in the two classes of cases was distinguished particularly in criminal prosecutions. A case in point is *Ex parte Gon-Shay-ee*, 130 U. S. 343. As stated in the opinion of the Court: "The controversy in this case turns upon the question whether the offense for which Gon-Shay-ee was tried was an offense against the laws of the United States and was of that character which ought to have been tried by the court sitting to try such cases, or whether it was an offense against the laws of the territory and should have been tried under those laws and by the court sitting to administer justice under them. The petitioner alleges that the offense with which he was charged was of the latter class, but that he was tried by the court while it was exercising its functions under the former." The Supreme Court held that since Gon-Shay-ee was subject to the jurisdiction of the Territory of Arizona, the murder was committed by him was a violation of the laws of the territory, and that, therefore, he should have been tried in accordance with the procedure provided by territorial law and by the court sitting to administer such law. After pointing out that the indictment did not lay the venue of the offense in any county of the territory, as required by law, and that the grand and petit jurors were summoned by the marshal of the United States, the Court said: "If the court which tried the prisoner had been sitting for the trial of offenses committed against the territorial law, all this would have been different. The grand jury would have been summoned for the county in which the act was committed, and from the body of that county by its sheriff; and the case would have been tried by the court sitting in that county. The prisoner would, on conviction, have been held by the sheriff who would have had the execution of the sentence committed to him under a warrant from the court. All these circumstances are so variant, in the nature of the jurisdiction and the mode in which it must be exercised, that the conviction of the prisone

under the one made by the law prescribed for the procedure under the other, can not be held to be within the power of the court which proceeded under the wrong jurisdiction." The question for decision, then, as stated by the court, was "whether the offense charged against Gon-Shay-ee was one against the laws of the United States within the meaning of the distinction which we have been taking, or whether it was an offense against the laws of the territory to be punished by a court proceeding under its laws." The court very naturally held that a violation of the criminal code of Arizona was not such an offense against the United States as should have been tried by the district court while "acting as a court for the trial of offense arising under the Constitution and laws of the United States and as administering them with the same powers as those vested in the circuit and district courts of the United States generally." No point was raised, nor comment made, in this case upon the fact that the prosecution was in the name of the United States and that the indictment was captioned "The United States of America *vs.* Gon-Shay-ee." The case, therefore is not authority for objection to the practice in the Canal Zone of laying prosecutions in the name of the United States. It is authority merely for the proposition that where, in an organized territory, a United States court is vested with dual jurisdiction and subject to distinct modes of procedure for the trial of Federal and municipal crime, an offense constituting the latter can not be tried under procedure provided for the former.

A like distinction in civil cases was made in *Clinton vs. Englebrecht*, 13 Wall. 434. The suit here was a civil action for the recovery of a penalty for the malicious destruction of property. The jury was not summoned in accordance with the provisions of the statute of the Territory of Utah, and the controlling question before the court was whether the law of the territorial legislature prescribing the mode of selecting a jury should have been followed. The Supreme Court held that it was competent for the territorial legislature to prescribe the mode of obtaining panels of jurors and that such mode, rather than that prescribed in the Judiciary Act of 1789, should be followed in the trial of cases arising under territorial law. As was said by the Court: "The regulations of that act in regard to the selection of jurors, have no reference whatever to territories. They were framed with reference to the States and can not, without violence to the rules of construction, be made to apply to territories of the United States." To the same effect was the decision in *Hornbuckle vs. Toombs*, 13 Wall. 648, where the Court held that: "The acts of Congress respecting proceedings in the United States courts are concerned with and confined to those courts, considered as parts of the Federal system, and as invested with the judicial power of the United

States expressly conferred by the Constitution and to be exercised in correlation with the presence and jurisdiction of the several State courts and governments."

In most, if not in all, of these later cases the court cites *American Insurance Co. vs. 356 Bales of Cotton*, *supra*, and an analysis of the decisions will show that fundamentally they all turn on the original distinction made by Chief Justice Marshall between "Constitutional" and "Legislative" courts. They, in no sense, are authority for the proposition that prosecutions for crime on the Canal Zone should not be maintained in the name of the United States. A case closer in point is that of *Snow vs. United States*, *ex rel*, 18 Wall. 317, where the question raised was whether the Attorney General of the territory could be authorized by the legislature to appear in place of the United States Attorney in prosecutions for violation of the laws of the territory. The Court, with seeming reluctance, conceded the power of the territorial legislature to make such provision, but remarked: "It must be confessed that this practice exhibits something of an anomaly. Strictly speaking, there is no sovereignty in a territory of the United States but that of the United States itself. Crimes committed therein, are committed against the Government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States and that the attorney of the United States was the proper officer to prosecute all offenses."

The foregoing statement by the Supreme Court would seem to express the logic of the situation, and so far as my examination goes it fails to disclose a case that holds it improper to maintain prosecutions in the name of the United States for crimes committed in a territory of the United States. The decisions of course, will show what the present practice is in Alaska and the Insular Possessions, but turning at random to the cases of *Dorr vs. United States*, 105 U. S. 138, and *Paraiso vs. United States*, 207 U. S. 308, it would appear that prosecutions in the Philippines are brought in the name of the United States.

The Canal Zone bears no resemblance to an organized territory. Strictly, it is not territory that belongs to the United States, but a Zone over which the Government exercises control and sovereignty by virtue of the terms of a treaty with the Republic of Panama. The government of the Canal Zone does not exercise even a delegated sovereignty. It is completely lacking in legislative powers. Even in such minor matters as the licensing of automobiles, breaches of the peace and disorderly conduct, Congress has legislated directly for the Zone in Sections 3 and 4 of an "Act approved August 11, 1918." The basis of municipal law upon the Zone is found in the provisions

of the Colombian Code which are operative not by any local enactment, but by virtue of a law of Congress. The District Court for the Canal Zone possesses no such dual capacity as did the United States court for the districts of the Territory of Arizona; it is not required to follow distinct modes of procedure, as was the court of Arizona, in the trial of criminal offenses. With the possible exception of prosecutions for crimes upon the high seas, an error of procedure such as committed in the case of Gon-Shay-ee is not liable of commission by the District Court for the Canal Zone; and the decision in the case of *Ex parte* Gon-Shay-ee, *supra*, is therefore in no way conclusive upon the proposition involved in this opinion.

An information charging a person with an offense against the peace and dignity of the "Government of the Canal Zone" would seem as fatally defective as an information, say, in Illinois, charging an offense against the peace and dignity of the "Sanitary District for Chicago." Like this sanitary district, the "Government of the Canal Zone" is a mere administrative body, possessing no legislative powers and none of the attributes of sovereignty. I question whether process can legally run in its name, and I am firm in my conviction that I would be guilty of gross error were I to sentence to prison or death a person charged merely with an offense against the peace and dignity of the "Government of the Canal Zone," and prosecuted in its name. The provisions of the Colombian Code which constitute the municipal law of the Canal Zone, are not operative because of any local enactment, but solely by virtue of an act of Congress. They are as much the law of the United States as though drafted in committee and originally enacted by Congress. A violation of their provision is a violation of a law of Congress, and an offense under them is an offense against the United States, which it seems clear should be prosecuted in the name of the United States and in a court of the United States.

By reason of the above and foregoing review of the law, the court is of the opinion that there is no error in bringing this, and like criminal actions, in the name of the United States.

Therefore, the demurrer on this ground is overruled and exception given the defendant.

RICE, Administratrix, *versus* PANAMA R. R. CO.

(District Court, Canal Zone, Cristobal Division, May 25, 1921.)

Civil No. 252.

1. MASTER AND SERVANT. EMPLOYERS' LIABILITY LAW. EXCLUSIVE REMEDY.

The Act of Congress adopted in 1916, known as the Federal Workmen's Compensation Law, does not expressly nor by implication repeal the law of the

Canal Zone giving a person who is injured as a result of negligence a right to recover therefor; nor does such compensation law provide an exclusive remedy.

Attorneys for plaintiff, *Todd and McIntyre*.

Attorneys for defendant, *Frank Feuille, Walter Van Dame, A. C. Hindman*.

HANAN, District Judge. In the case at bar, the Minnix case, and others, the injured parties were employees of the Panama Railroad Company, and asked for personal injuries sustained in the course of their employment.

In the absence of statutory provision to the contrary, they, of course, would have the right to maintain an action against the defendant company under the laws for the Canal Zone.

It is contended, however, by the Panama Railroad Company that this right of action is denied to plaintiff by Act of Congress in 1916, known as the Federal Workman's Compensation Law; and that their only remedy for the injury that they have sustained is to take the benefits under that act, which the railroad maintains is exclusive.

It is, I think, clear that a person can not be deprived of a common-law right except by clear expression or necessary implication. The presumption would always favor the continued existence of the right, and the party who challenges its existence must overcome that presumption.

As said by the Supreme Court of Massachusetts: "It is a rule of statutory construction that an existing common-law right of action is not to be taken away by statute unless by direct enactment or necessary implication." *King vs. Viscolord*, 106 N. E. 988.

The Act of Congress in 1916, nowhere states that it shall be compulsory upon the part of an employee to take the benefits of the act, or that he is precluded from pursuing his common-law right of action. This lack of expression is significant. In every State where compensation laws are compulsory the legislative enactment expressly makes them so; and as a general proposition it would seem that if Congress intended that this act should be compulsory and exclusive it would have said so expressly, somewhere in the body of the statute.

It may be contended that the mere fact of the enactment of a workmen's compensation law indicates an intention to supercede the common-law right of action for injuries received. I do not believe, however, that such inference would be strong enough to overcome the fundamental presumption that an existing right will persist unless the statute very clearly indicates an intention to destroy it.

Turning to the act itself, we find evidence in some of the provisions that there is no intention to make its benefits exclusive. Section 26 provides that: "If an injury or death for which compensation is pay-

able under this act is caused under circumstances creating a legal liability upon some person other than the United States to pay damage therefor, the Commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person; or the Commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such an assignment or prosecute said action in his own name, when required by the Commission, he shall not be entitled to any compensation under this act."

Section 27 provides that: "If any injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and the beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him, or on his own behalf, or the result of a settlement made by him or on his behalf, any money or other property, in satisfaction of the liability of such other person, such beneficiary shall, after deducting the cost of suit and reasonable attorney fees, apply the money so received in the following manner: (a) If his compensation has been paid in full or in part, he shall refund to the United States the amount of compensation which he has been paid, etc. (b) If no compensation has been paid to him by the United States he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

Under this provision, a civilian employee of the United States, at the Federal Building in Indianapolis for example, would fall into an open elevator shaft and sustain injury, he could recover compensation under this act from the United States; if, instead of falling into the elevator shaft he had been negligently or wrongfully pushed by another person into the shaft, he unquestionably could bring suit against such wrongdoer. In this event, if he desired to take compensation under the act he would be required to assign his claim against the third party to the United States, or if he had already recovered damages against the wrongdoer, or made settlement with him, he would be required to credit that money received from the third party upon any compensation payable to him by the United States.

It is clear, however, that the provisions of the statute do not deprive him of his right of action against the third person. He may ignore the compensation act and bring suit in his own behalf against the wrongdoer and retain for himself whatever money he recovered.

Under the terms of the act the same choice of remedy appears to be left to an employee of the Panama Railroad Company. The term

“employee” as used in the statute includes an employee of the Panama Railroad, and there is no indication of any distinction being made in an application of the act between employees of the United States and the Panama Railroad. This being true, the rights of an employee of the Railroad Company should be the same as the rights of an employee of the United States, and such employee could elect to satisfy his claim for personal injury by suit against a third party liable therefor, in this case, the Panama Railroad Company.

The only provision in the statute that might suggest an intention on the part of Congress to make its remedy exclusive is found in Section 41, to wit: “If an injury or death for which compensation is payable under this act is caused under circumstances creating legal liability in the Panama Railroad Company to pay damages therefor, under the laws of any State, territory or possession of the United States, or District of Columbia, or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad, any right of action he may have to enforce such liability of the Panama Railroad Company.”

Counsel for the Panama Railroad Company in all its cases raising this question in this court laid stress upon this provision, and contend that by implication it indicates an intention to permit an election of the common-law remedy only in those cases where the cause of action arises outside of the Canal Zone. It might be answered, first of all, that this suit is in derogation of the common-law right, must be strictly construed in favor of the right, and that strictly speaking, the Canal Zone is a possession of the United States within the meaning of the term as used in the statute. Apart from this, it can be urged with reason that the purpose of this provision is merely to prevent a double collection of damages where the right of action arises, outside of as well as within the Canal Zone.

In any event I do not believe that this provision can be held to necessarily imply an intention to deprive an employee of the Panama Railroad of his existing common-law right of action. To so deprive him the implication would have to be a necessary one. As was said by the Supreme Court of Massachusetts in upholding the common law right of action for death of a minor child, notwithstanding the compensation act: “We have no right to conjecture what the Legislation would have enacted if they had foreseen the occurrence of a case like this; much less can we read into a statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or set purpose, this is the rule adopted in the construction of all written instruments that no words can be supplied by construction unless it plainly appears that words ought to be supplied. It may be added also that another rule of statutory

construction is that an existing common-law right of action is not to be taken away by statute unless by direct enactment or necessary implication." *King vs. Viscolord Co.* (Mass.), 106 N. E. 988, 7 N. C. C. A.

It is submitted that the act of Congress in question does not by direct expression nor by necessary implication deprive an employee of the Panama Railroad Company of his existing right to maintain an action against the Panama Railroad Company for injury received in the course of his employment; and this question has been passed upon a number of times by the courts. In the absence of such expression or necessary implication his right of action exists, and I believe that in the case at bar, as well as the other cases in which this point has been raised, the demurrer of the defendant to the plaintiff's complaint should be overruled. I think I am not without support by the courts in this contention. In the case of *Dahn vs. McAdoo*, Director General, 256 Fed. 549, the Court said: "That a mail clerk employed by the United States upon a mail car used in the carriage of mails upon railroads is a employee of the United States, and within the meaning of this act, is not doubted nor is it disputed; and when such an employee is disabled or killed in the performance of his duties, and seeks to recover from the United States the compensation so provided, it is obvious that he must proceed in the manner provided by this act; but in no part of the act is it directly or by implication provided that the injured employee or his legal representative shall be limited to the amount of compensation so provided in this act as against a wrongdoer who by some neglect or other wrongful act has caused the death or disability of the injured employee, and to so prohibit would be to amend the act, which the court will not do."

It will be noted that Judge Reed, in the Northern Division of Iowa, in the case of *Dahn vs. McAdoo*, etc., 256 Fed. 549, at page 553, said: "And it may be that Congress might have required the injured employee to seek redress for such disability or injury exclusively from the United States and in a manner provided in the act, * * * But, be this as it may, the Congress has not done so. By Section 1 of that act it is provided: 'That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty except under the conditions prescribed in the act.' Comp. Stats. Sec. 8932a." On the same page the Court said: "But in no part of the act is it directly or by implication provided that the injured employee or his legal representative shall be limited to the amount of compensation so provided in this act as a wrongdoer who by some neglect or other wrongful act has caused the death or

disability of the injured employee, and to so prohibit would be to amend the act, which the court will not do."

In the case of *Hines, Director General of Railroads, vs. Dahn*, 267 Fed. 105, which was an action brought against the Illinois Central Railroad Company and the Director General of Railroads, and the plaintiff has recovered under the Employers' Compensation Act, and then brought an action against the two defendants. At page 114 the court in discussing the right of the plaintiff to bring another action after receiving compensation under the compensation act said: "Workmen's compensation acts are all alike as to the object sought to be obtained, but they are so numerous and so varied as to detail of administration that each act must be considered by itself. We are of the opinion as to the United States the act in question is compulsory if the employee gives a notice and files a claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employee as to whether he will make a claim under the act or not. If he does not, in our opinion, he would have a right to maintain the present action and prosecute the same to judgment, as we think the United States, as to the particular case, by the Federal Control Act consented to be sued. But if the employee elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue, and having elected to pursue one, he may not pursue the other. The States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the compensation act, the remedy afforded by the act is conclusive. (This case was decided by the Circuit Court of Appeals of the Eighth Circuit.)

Also, this is an action against the Panama Railroad Company, a corporation organized under the laws of the State of New York; while it may be true that the greater majority of the stock of this corporation is owned by the Government of the United States, but regardless of this fact the Panama Railroad Company has only such rights when being sued for personal injuries caused by it as any other railroad corporation would have. If the Government steps down from its high sovereign duty of state to enter into the commercial world and carry on commerce through a corporation as the Panama Railroad Company, that does not relieve the Panama Railroad from all the liabilities that any other railroad corporation would be subjected to if the stock was owned by individuals solely, and not by the Government or any branch thereof.

For the foregoing reasons, the demurrer to the complaint herein is overruled.

MINNIX *versus* PANAMA R. R. CO.

(District Court, Canal Zone, Cristobal Division, May 25, 1921.)

Civil No. 327.

1. MASTER AND SERVANT. EMPLOYERS' LIABILITY ACT.

An injured employee of the Panama R. R. Co., whose injury results from negligence, may sue under the provisions of the Employers' Liability Act. (C. S., Sec. 8658).

2. UNITED STATES. PANAMA R. R. CO. SUBJECT TO SUIT.

The liability of the Panama R. R. Co. to a suit and its property to seizure, as any other railroad, is not affected by the fact that the United States is the sole stockholder.

3. MASTER AND SERVANT.

Duty of master can not be delegated. The duty of making reasonably safe the place where an employee works, and the duty of warning him of unsafe conditions, are duties of the master who can not avoid responsibility for their nonperformance by delegating them to a fellow servant. (Affirmed 282 Fed. 47.)

Attorneys for plaintiff, *Todd and MacIntyre*.

Attorney for defendant, *W. F. Van Dame*.

HANAN, District Judge. In the case at bar, the Minnix case, and others, the injured parties were employees of the Panama Railroad Company, and asked for personal injuries sustained in the course of their employment.

In the absence of statutory provision to the contrary, they, of course, would have the right to maintain an action against the defendant company under the laws for the Canal Zone.

It is contended, however, by the Panama Railroad Company, that this right of action is denied to plaintiff by Act of Congress in 1916, known as the Federal Workmen's Compensation Law; and that their only remedy for the injury that they have sustained is to take the benefits under that act, which the railroad maintains is exclusive.

It is, I think, clear that a person can not be deprived of a common-law right except by clear expression or necessary implication. The presumption would always favor the continued existence of the right, and the party who challenges its existence must overcome that presumption.

As said by the Supreme Court of Massachusetts: "It is a rule of statutory construction that an existing common-law right of action is not to be taken away by statute unless by direct enactment or necessary implication." *King vs. Viscolord*, 106 N. E. 988.

The Act of Congress in 1916, nowhere states that it shall be compulsory upon the part of an employee to take the benefits of the act, or that he is precluded from pursuing his common-law right of action. This lack of expression is significant. In every State where com-

pensation laws are compulsory the legislative enactment expressly makes them so; and as a general proposition it would seem that if Congress intended that this act should be compulsory and exclusive it would have said so expressly, somewhere in the body of the statute.

It may be contended that the mere fact of the enactment of a workman's compensation law indicates an intention to supersede the common-law right of action for injuries received. I do not believe, however, that such inference would be strong enough to overcome the fundamental presumption that an existing right will persist unless the statute very closely indicates an intention to destroy it.

Turning to the act itself, we find evidence in some of the provisions that there is no intention to make its benefits exclusive. Section 26 provides that: "If an injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability upon some person other than the United States to pay damage therefor, the Commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person; or the Commission may require said beneficiary to prosecute said action in his own name. If the beneficiary shall refuse to make such an assignment or prosecute said action in his own name, when required by the Commission he shall not be entitled to any compensation under this act."

Section 27 provides that: "If any injury or death for which compensation is payable under this act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and the beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him, or on his own behalf, or the result of a settlement made by him or on his behalf, any money or other property, in satisfaction of the liability of such person, such beneficiary shall, after deducting the cost of suit and reasonable attorney fees, apply the money so received in the following manner: (a) If his compensation has been paid in full or in part, he shall refund to the United States the amount of compensation which he has been paid, etc. (b) If no compensation has been paid to him by the United States he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury."

Under this provision, a civilian employee of the United States, at the Federal Building in Indianapolis for example, would fall into an open elevator shaft and sustain injury, he could recover compensation under this act from the United States; if, instead of falling

into the elevator shaft he had been negligently or wrongfully pushed by another person into the shaft, he unquestionably could bring suit against such wrongdoer. In this event, if he desired to take compensation under the act he would be required to assign his claim against the third party to the United States, or if he had already recovered damages against the wrongdoer, or made settlement with him, he would be required to credit that money received from the third party upon any compensation payable to him by the United States.

It is clear, however, that the provisions of the statute do not deprive him of his right of action against the third person. He may ignore the compensation act and bring suit in his own behalf against the wrongdoer and retain for himself whatever money he recovered.

Under the terms of the act the same choice of remedy appears to be left to an employee of the Panama Railroad Company. The term "employee" as used in the statute includes an employee of the Panama Railroad, and there is no indication of any distinction being made in an application of the act between employees of the United States and the Panama Railroad. This being true, the rights of an employee of the Railroad Company would be the same as the rights of an employee of the United States, and such employee could elect to satisfy his claim for personal injury by suit against a third party liable therefor, in this case, the Panama Railroad Company.

The only provision in the statute that might suggest an intention on the part of Congress to make its remedy exclusive is found in Section 41, to wit: "If an injury or death for which compensation is payable under this act is caused under circumstances creating legal liability in the Panama Railroad to pay damages therefor, under the laws of any State, territory or possession of the United States, or District of Columbia, or of any foreign country, no compensation will be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action he may have to enforce such liability of the Panama Railroad Company."

Counsel for the Panama Railroad Company in all its cases raising this question in this court laid stress upon this provision, and contend that by implication it indicates an intention to permit an election of the common law remedy only in those cases where the cause of action arises outside of the Canal Zone. It might be answered, first of all, that this suit is in derogation of the common-law right, must be strictly construed in favor of the right, and that strictly speaking, the Canal Zone is a possession of the United States within the meaning of the term as used in the statute. Apart from this, it can be urged with reason that the purpose of this provision is merely to prevent a double collection of damages where the right of action arises, outside of as well as within the Canal Zone.

In any event I do not believe that this provision can be held to necessarily imply an intention to deprive an employee of the Panama Railroad of his existing common-law right of action. To so deprive him the implication would have to be a necessary one. As was said by the Supreme Court of Massachusetts in upholding the common-law right of action for death of a minor child notwithstanding the compensation act: "We have no right to conjecture what the Legislature would have enacted if they had foreseen the occurrence of a case like this; much less can we read into a statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or set purpose this is the rule adopted in the construction of all written instruments that no words can be supplied by construction unless it plainly appears that words ought to be supplied. It may be added also that another rule of statutory construction is that an existing common-law right of action is not to be taken away by statute unless by direct enactment or necessary implication." *King vs. Viscolord Co.*, (Mass.) 106 N. E. 988, 7 N. C. C. A.

It is submitted that the Act of Congress in question does not by direct expression nor by necessary implication deprive an employee of the Panama Railroad Company of his existing right to maintain an action against the Panama Railroad Company for injury received in the course of his employment; and this question has been passed upon a number of times by the courts. In the absence of such expression or necessary implication his right of action exists, and I believe that in the case at bar, as well as the other cases in which this point has been raised, the demurrer of the defendant to the plaintiff's complaint should be overruled. I think I am not without support by the courts in this contention. In the case of *Dahn vs. McAdoo*, Director General, 256 Fed. 549, the Court said: "That a mail clerk employed by the United States upon a mail car used in the carriage of mails upon railroads is an employee of the United States, and within the meaning of this act, is not doubted nor is it disputed; and when such an employee is disabled or killed in the performance of his duties, and seeks to recover from the United States the compensation so provided, it is obvious that he must proceed in the manner provided by this act; but in no part of the act is it directly or by implication provided that the injured employee or his legal representative shall be limited to the amount of compensation so provided in this act as against a wrongdoer who by some neglect or other wrongful act has caused the death or disability of the injured employee, and to so prohibit would be to amend the act, which the Court will not do."

It will be noted that Judge Reed, in the Northern Division of Iowa, in the case of *Dahn vs. McAdoo, etc.*, 256 Fed. 549, at page 553, said: "And it may be that Congress might have required the injured employee to seek redress for such disability or injury exclusively from the United States and in a manner provided in the act, * * * But, be this as it may, the Congress has not done so. By Section 1 of that act it is provided: 'That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty except under the conditions prescribed in the act.' Comp. Stats. Sec. 8932a." On the same page the Court said: "But in no part of the act is it directly or by implication provided that the injured employee or his legal representative shall be limited to the amount of compensation so provided in this act as a wrongdoer who by some neglect or other wrongful act has caused the death or disability of the injured employee, and to so prohibit would be to amend the act, which the Court will not do."

In the case of *Hines, Director General of Railroads, vs. Dahn*, 267 Fed. 105, (No. 1 Advance Sheet), which was an action brought against the Illinois Central Railroad Company and the Director General of Railroads, and the plaintiff has recovered under the Employers' Compensation Act, and then brought an action against the two defendants. At page 114 the Court in discussing the right of the plaintiff to bring another action after receiving compensation under the compensation act said: "Workmen's compensation acts are all alike as to the object sought to be obtained, but they are so numerous and so varied as to detail of administration that each act must be considered by itself. We are of the opinion as to the United States the act in question is compulsory if the employee gives a notice and files a claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employee as to whether he will make a claim under the act or not. If he does not, in our opinion, he would have a right to maintain the present action and prosecute the same to judgment, as we think the United States, as to the particular case, by the Federal Control Act consented to be sued. But if the employee elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue and having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is conclusive. (This case was decided by the Circuit Court of Appeals of the Eight Circuit.)

Also, this is an action against the Panama Railroad Company, a corporation organized under the laws of the State of New York; while it may be true that the greater majority of the stock of this corporation is owned by the Government of the United States, but regardless of this fact, the Panama Railroad Company has only such rights when being sued for personal injuries caused by it as any other railroad corporation would have. If the Government steps down from its high sovereign duty of state to enter into the commercial world and carry on commerce through a corporation as the Panama Railroad Company, that does not relieve the Panama Railroad from all the liabilities that any other railroad corporation would be subjected to if the stock was owned by individuals solely, and not by the Government or any branch thereof.

For the foregoing reasons, and others which the Court has heretofore stated orally, the demurrer to the complaint herein is overruled.

FALK *versus* S. S. "OLOCKSON."

(District Court, Canal Zone, Balboa Division, September 17, 1921.)

Civil, No. 402.

1. ADMIRALTY. SALVAGE. COMMON OWNERSHIP.

The crew of the vessel performing a salvage service, although the vessels belong to a common owner, are entitled to salvage.

2. ADMIRALTY. SALVAGE. WHAT VESSELS MAY CLAIM.

A government tug which performs a salvage service may recover therefor. It does not fall within the class known as "public" vessels, such as lifeboats, fire boats, hospital ships, war vessels and the like, which are not entitled to compensation for such service.

3. ADMIRALTY. SALVAGE. AGREEMENT FOR SERVICE.

Before service rendered under contract therefor can bar a salvage claim, the terms of the contract must be so explicit as to warrant the conclusion that salvage was expressly excluded.

4. SALVAGE. AWARD.

Vessel and cargo salvaged were valued at \$1,078,000. Held, under circumstances of this case that the crew be awarded \$15,000.

(Note.—Aff'd 5th C. C. A., 281 Fed. 690.)

Proctors for libellant, *Todd and McIntyre*.

Proctor for Government, *A. C. Hindman*, United States District Attorney.

Proctor for claimant of cargo, *C. P. Fairman*.

KERR, District Judge. This action was instituted by Leopold Falk, a mariner, for and on his own behalf, and the members of the

crew of the tug *Gorgona*, against the S. S. *Olockson*, her engines, tackle, apparel, furniture and cargo. The proof of the libellants, and the proof taken on behalf of the owners of the steamship and the cargo, discloses no serious difference with respect to the main facts.

On the 13th day of March, 1920, the S. S. *Olockson* was reported to be on fire at sea, in a perilous condition, with the U. S. S. *Tacoma* standing by, prepared to sink her if she should become a menace to navigation. Upon receipt of advice that the *Olockson* was burning, the agent of the owners immediately communicated that fact to the Marine Superintendent of The Panama Canal, and after informing him of the situation inquired what Canal equipment he could furnish to send to her assistance. Being informed the tug *Gorgona* was the only available vessel, it was agreed it should be dispatched as soon as possible. The *Gorgona* being at the time somewhere in the harbor, the evidence would indicate that the Superintendent of Marine sent the following radiogram to Captain Howard, officer in command:

S. S. *Gorgona*:

Proceed immediately with all dispatch to assistance steamer *Olockson* on fire near beach at Matiato Point fifty miles west of Cape Mala. U. S. S. *Tacoma* is also proceeding to assistance and expects to arrive there about three o'clock this afternoon. Report immediately estimated hour your arrival Matiato Point.

Acknowledge.

SARG.,
Marine Supt.

Some discrepancy appears in the testimony concerning the delivery of this radiogram to Captain Howard. But whether through this message, or through a personal interview with Captain Sargent, at his office, Captain Howard was made acquainted with the distress of the *Olockson*. The message received by Captain Sargent, as transcribed in the report of Captain Howard, made on the 20th of March, read as follows:

Olockson on fire 24 miles southwest of Cape Mala. Burning fiercely amidship, also No. 3 hold. Cargo 2,700,000 gals. gasoline, 2,500 tons steel. All hands have abandoned ship. Now aboard *Tacoma*. Consider unsafe to tow *Olockson* with *Tacoma*. She has settled slightly to starboard. Sea smooth.

(Signed) JACKSON,
Commanding U. S. S. *Tacoma*.

The steamship *Tacoma* was a naval cruiser, commanded by Captain Jackson, and had gone to the assistance of the *Olockson*.

Captain Howard testifies that in the conversation had between himself and Captain Sargent, the latter informed him that he was sending him out to beach her wherever it was possible, closest to land.

The *Gorgona* left the Balboa docks on the evening of March 13, and first sighted the *Olockson* about 6.30 on the morning of the 14th, approximately 125 miles from the port of Balboa, and about 35 miles off Punta Mala, on the Panama coast. The *Tacoma* upon the arrival of the *Gorgona*, was lying about one-half mile to the windward of the *Olockson*, the entire crew of which had been transferred to the *Tacoma*. Some conversation was had between Captain Howard, of the *Gorgona*, on the one hand, and Captain Jackson of the *Tacoma*, and Captain Endreson of the *Olockson* on the other, in which Captain Howard says he informed them he had been instructed by Captain Sargent to have the *Tacoma* shell and sink the *Olockson*, but that Captain Jackson refused unless so instructed by the Commandant of the 15th Naval District; that Captain Endreson had abandoned all hope of saving his vessel, and so stated to Captain Jackson, and that he was willing she should be shelled and sunk in order that she might not become a menacing derelict; that he stated he was willing to tow the burning ship if it were possible to get his hawser aboard her, and he thought it was up to the crew of the *Olockson* to make the attempt, neither he nor Captain Jackson caring to risk the lives of their men in such a hazardous undertaking, but Captain Endreson refused; that following this conversation Captain Jackson, Captain Endreson, himself, and only two others boarded the tug, and approached the *Olockson* from the windward to within 200 feet; that they found she had listed to the starboard; that the fire was burning in all the hatches, and also in the boiler and engine rooms, and that explosions were taking place about every 15 minutes, the steel drums being sometimes thrown as high as 200 feet in the air, followed by dense clouds of smoke; that the tug lay alongside in this position for fully an hour, during which time the possibility of making a towing hawser fast to the ship was freely discussed, the consensus of opinion being that such an undertaking was too hazardous, owing to the fact the ship might buckle and sink, or explode at any moment, in which event there would be little chance of saving either the tug, or the lives of its crew; that after some hesitation on the part of all, the tug was gradually eased alongside, and before any one knew their purpose two of the crew of the *Gorgona*, A. Anderson and C. Maner, climbed up the bulwarks of the ship, without orders, purely on their own initiative, rushed to the front where the heat was not so intense, caught up the hawser, made it fast, and then either jumped into the sea to escape the heat and gas, or were taken off by the *Tacoma's* whaleboat; that the *Gorgona* then headed for Guanico Point about 20 miles distance, towing the burning ship, that being the place where it had been the idea of Captain Sargent the boat should be beached.

Captain Jackson, Captain Endreson, and the others who had boarded the tug returned to the *Tacoma* about 4 p. m. on the afternoon of the 14th, without going aboard the *Olockson*. Guanico Point was not reached until it was too late to beach. Some conversation occurred between Captain Jackson and Captain Howard, the result of which was that Captain Sargent was asked to give his consent to let the tug round Cape Mala during the night. At 7 p. m. Captain Howard received a message from Captain Sargent which read as follows:

To Howard, *Gorgona*:

You are authorized to use your own discretion with regards to any requests made by Master *Olockson* as to disposition that vessel.

(Signed) SARGENT.

Captain Howard responded that he would round Cape Mala that night.

The *Tacoma* left about 8 p. m. for Balboa, leaving Captain Endreson and his chief officer with the tug. About 1 o'clock that night the hawser parted and the ship was again set adrift. On the morning of the 15th a further attempt was made to attach the hawser and renew the tow. After considerable trouble the hawser was attached to the stern, and the tow began in that way. So far had the vessel drifted during the night, all the distance gained on the previous day had been lost. Impressed with the possibility of reaching Balboa, Captain Endreson consented that the towage should continue, and he himself entered into the spirit of the undertaking with enthusiasm. Much difficulty was encountered, and the man Maner, at great personal risk, again boarded the vessel for the purpose of readjusting the towing apparatus. So much time was lost in this endeavor the entire day was practically consumed before a renewed towage was begun. Almost instantly thereafter both lines parted, and the *Olockson* was adrift for the third time.

A radio message was sent to Captain Sargent to send new material by the *Tacoma* or any other vessel coming in that direction. The *Tacoma* left on the morning of the 16th with new equipment. At 4 p. m. the hawser which had been attached after the third break, again parted, and for the fourth time the *Olockson* was adrift. The *Tacoma* arrived about 5 p. m., and the materials which she had brought were transferred to the tug. The *Olockson* was approached about 7 p. m., the new hawser attached, and the towage again renewed. No further mishap of importance occurred, and Balboa harbor was reached about 5 p. m. on the afternoon of the 17th; and beached according to direction of Captain Sargent.

After arrival the fire department of the Canal was sent to the *Olockson* and continued for nearly a day, perhaps longer, to flood the boat with water in order to subdue the flames.

The facts narrated by Captain Howard are supported by the testimony of the men who boarded the boat in the first instance. The statement of Captain Endreson that he desired the *Olockson* to be shelled by the *Tacoma*, and sunk, was testified to by two of the tug crew, Maner and Anderson.

Captain Howard in his testimony stated on cross-examination that the action of the two sailors practically decided the question of attempting to save the vessel, and that the question of salvage did not enter his mind during the entire time he was engaged.

Mr. R. A. Martin, the local representative of the Panama Agencies Company, testified that he engaged the services of the tug *Gorgona* from Captain Sargent, and at the conclusion of the services The Panama Canal was paid the sum of \$2,560, either by the Shipping Board, or by some one for it.

Captain Jessop, present Marine Superintendent of The Panama Canal, testified that the *Gorgona* was a part of the public equipment of the Panama Canal, and that the fees received from private hirings were paid into the Canal treasury.

This, it is believed, is a fair statement of the facts as revealed by the testimony.

The proof in this case, in the form in which it has been presented to the court, does not admit of much doubt with respect to the main facts, but the application of the law to these facts presents many questions that are both intricate and difficult.

The position taken by libellants may be thus briefly summarized:

(a) Was the work performed properly a salvage service?

(b) Does the fact that both vessels, the *Gorgona* and the *Olockson* belong to the same owner (The United States), bar the crew of either for recovery for a salvage service for the other?

(c) Does the fact that libellants were in the employ of the United States bar their right to recovery?

(d) Were the conditions precedent to the right to recover salvage present in the case at bar? i. e.:

1. Was the *Olockson* exposed to a marine peril?

2. Was the service of libellants voluntary?

3. Was it successful?

(e) Does the fact that the officials of The Panama Canal chose to consider the work as a towage instead of a salvage service, and billed the owners of the *Olockson* and collected for a towage service, bar the libellants from recovering for salvage?

(f) Does the fact that libellants received their ordinary wages in full from the Panama Canal for all the time they were engaged in saving the *Olockson* affect their right to recover salvage against the salved ship and cargo?

The position taken by the owners of the cargo and the owners of the vessel deny any right of recovery in the libellants, and assign the following reasons:

(a) A valid contract was entered into between the duly authorized agent of the owner of the S. S. *Olockson* and The Panama Canal for the services of the tug *Gorgona*

and her Master and crew, by the terms of which the said owner agreed to and was bound to pay the sum of \$25 per hour from the time of departure until the return of the said tug, absolutely, in any event, and irrespective of the success or failure of the enterprise.

(b) The tug *Gorgona* was a government ship devoted exclusively to a public service within the meaning of the Act of Congress of August 1, 1912. (Ch. 268, 384.)

(c) The tug *Gorgona* is not a "merchant vessel" within the meaning of Section 10 of the Act of Congress, approved March 9, 1920.

These several questions, and the authorities bearing thereon, will be severally considered.

1. What is salvage and what is towage has been so clearly defined by the text writers, and by the courts in such a number and variety of cases, that there can be but little trouble encountered in distinguishing between the two classes of service. To establish a case of salvage the vessel must be disabled and in need of assistance, while towage is ordinarily a service confined to vessels that have not been injured, and is rendered for the purpose of expediting the voyage. It will be seen from these definitions that the test will be found in the condition of the vessel, whether injured or in peril, or whether rendered for the mere purpose of giving expedition to a voyage already undertaken, being usually a harbor or sound service, except upon the Great Lakes where towage is a common form of assistance. A towage, therefore, may be a salvage service, while the converse may seldom, if ever, be true.

Hughes, Admiralty, p. 118, Sec. 57; Kennedy, The Law of Civil Salvage, pp. 2 and 22; the *Emily B. Sander*, Fed. Cases, 4458; the *J. C. Pfliger*, 109 Fed. 93; Benedict on Admiralty (4th Ed.) p. 170; Abbott on Shipping (14th Ed.) p. 960; Williamson vs. Alphonso, Fed. Cases, No. 17749; *The Centurion*, Fed. Cases No. 2554; the *Lowther Castle*, 195 Fed. 604; McConnoche vs. Kerr, 9 Fed. 50.

In the latter case Judge Brown has thus clearly stated the difference:

A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger.

In the *Emily B. Sander* case, above noted, Justice Field has stated the distinction to the same effect:

It is well settled that, if there is no actual or probable danger, and the employment is simply for the purpose of expediting the voyage, such service is towage and not salvage.

The statement of facts, heretofore recited, clearly discloses the peril of the *Olockson* at the time she was first sighted by the tug *Gorgona*. Her entire crew had been transferred to the *Tacoma*; she was burning fiercely at various points; explosions were frequent, the steel drums containing gasoline being thrown many feet in the air when these explosions would occur. As nearly as may be described

she was a floating derelict, going whither the winds and currents might carry her. That she was in peril; that she needed assistance and must perish without it, is the uncontradicted evidence of all those who saw her. That the services rendered her in this condition by the tug which had been dispatched from Balboa were not "for the purpose of expediting the voyage" on which she had set out, is so obvious any argument to the contrary would be an absurdity. Whatever service was rendered, therefore, must have been a salvage and not a towage service, and in the further consideration of this case, without reference to other facts and circumstances which will arise, will be so treated.

2. It is urged by counsel for respondents that the libellants can not recover for the reason that the tug *Gorgona* and the vessel *Olockson* had a common ownership (the United States). Libellants claim, on the contrary, that this action is prosecuted pursuant to Sec. 10 of the Act of Congress of March 9, 1920, which provides as follows:

That the United States and the crew of any merchant vessel owned by the United States or such corporation shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any monies recovered therefrom by the United State for its benefit and not for the benefit of the crew shall be covered into the United States Treasury to the credit of the Department of the Government of the United States or of the United States Shipping Board, or of such corporation having control or the possession or operation of such vessel.

It is admitted that the tug *Gorgona* was operated by The Panama Canal, and that the *Olockson*, while operated by the Barber Line, was what was known as a Shipping Board vessel, and that each belonged to the United States. It is evident the purpose of the Act of Congress was to give relief to salvors against the established rule which prevented suit against the United States except by consent. Accordingly, the act in question was passed making all vessels belonging to the United States subject to the general laws and rules governing privately owned merchant vessels, except that a vessel owned by the United States might be relieved from the operation of a libel *in rem*, and the ship be released, as was done in the present case. In the recent case of *Jacobson vs. Panama Railroad Company*, 266 Fed. 344, it was held that a common ownership, even on the part of the United States, need not deprive the master and crew of the salvaging vessel of compensation for salvage services, and that the members of the crew had an independent right accorded them by law for compensation in a salvage action. See also *Rees vs. United States*, 134 Fed. 146; *The Colima*, 6 Fed., Case 2996. Under authority of these cases, and what would seem to be a fair construction of the Act of Congress, above recited, the plea in bar with respect to a common ownership, must be denied.

3. The contention that the tug *Gorgona* was not a "merchant vessel" in contemplation of the statute, and that, therefore, the Act of Congress of March 9, 1920 does not apply, that act giving relief only to the crews of "merchant vessels," presents a question that is by no means free from doubt. It would seem from the proof before the court that this is a tug owned or operated exclusively by The Panama Canal, doing such service as a tug of like character is usually employed to do; that on occasion it has been, and may still be, hired out on a per diem or *per horam* contract for such service as may be desired. On the present occasion there was a hiring at \$25 an hour contracted for by the agent of the owners or operators of the *Olockson*. It is the contention of counsel for respondents that the *Gorgona* belonged to that class of vessels whose services are dedicated to the public, and that therefore her crew can not recover, being in the service of, and paid by, the United States, and that inasmuch as the tug was the property of the United States, and no risk was incurred by the crew with respect to any damage that might be done to the tug, the crew can not recover. It must be conceded that tugs, or like sea craft, engaged in a public service, such as lifeboats, revenue cutters, ships of war, hospital ships, or any vessel appropriated exclusively to public uses and services, except in rare instances, are not entitled to recover in claims for salvage. It is urged by libellant that the fact that the *Gorgona* was frequently hired out under contract, for a stipulated compensation, to do a private service, removes it from that class of vessels whose services have been appropriated exclusively to public service, and places it among those of that class that are designated as "merchant vessels." Clearly such use takes it out of that class to which lifeboats, hospital ships, fire boats, and war vessels belong. No definition of the term "merchant vessel" seems to have ever been given by any of the courts. In the common acceptance of the term the *Gorgona* may not belong to either class, but if it must be classed as either a public or a merchant vessel, it would seem to follow, from what precedes, that it must be regarded as belonging to the merchant class, so far as the present action is concerned. The reasons for this conclusion need not be left to conjecture. It is true the *Gorgona* is a government-owned boat, that it went to the assistance of the *Olockson* under government orders, but it went for a consideration to be paid to the Government. The *Olockson*, it will be recalled, was 125 miles from the port of Balboa, there was no legal or moral duty on the Canal authorities to send this tug to the rescue of a boat that distance from port, the safety of the crew having already been provided by the *Tacoma*. There was no legal obligation on the crew to engage in that service, whereas in a vessel dedicated to the public the obligation would exist. Had

the *Gorgona* belonged to that class of vessels whose services belonged to the public it would be unnecessary to inquire if it would have been necessary for the agent of the *Olockson* to have contracted for a fixed stipend for the services to be rendered? Conversely, then would it be necessary in order to secure the services of a vessel dedicated to a public use to first enter into a contract of employment? Manifestly the answer must be in the negative, and being in the negative do the discriminations made in the statute apply to the *Gorgona*? Is not the question whether a vessel belongs to the merchant class, or a class devoted exclusively to the public, to be determined by the character or service it actually renders rather than by its ownership? The *Nisamaka*, 263 Fed. 959. In determining the status of the *Gorgona* therefore, with reference to its relation to that class of vessels engaged in a public service exclusively, it would seem that the very fact that it is operated by the Canal authorities for a consideration, fixed and established, and that its services can be engaged by any one paying the requisite charges, would necessarily eliminate it from the public service class. Since, then, the act exempts those vessels that are denominated as public, whose crews owe a legal duty to render a service, whatever may be the relation of the *Gorgona* to the merchant class, is the right of libellants to recover effected thereby, if, in fact, it does not belong to the excepted class? Was it intended by the statute to give the term "merchant vessel" a narrow, technical, restricted meaning, or was the term used in a broad, inclusive sense? Having created a right of recovery on the part of the United States and the crew of any "merchant vessel" owned by the United States, to sue for and collect salvage services rendered by such vessel and crew, was it the purpose of Congress to determine that right by the character of the vessel rather than by the service rendered, the act itself having no reference in that connection to vessels of the excepted class? If such meaning had been intended is it not reasonable to suppose the phrase "merchant vessel" would have been interpreted or defined in clear and unmistakable words? And is it fair to presume that Congress intended to reward the crew of a merchant vessel for heroic service and to withhold that reward from the crew of a privately owned tug boat? If the act of Congress should be interpreted in such way as to permit an affirmative answer to these questions it would mean that in the rescue of a vessel in peril by the joint services of a tug and a merchant vessel, the crew of the merchant vessel could recover a salvage service, while the crew of the tug could not, no matter how valiant may have been their services, or to what extent they may have contributed to the work of rescue. Certainly any court would hesitate to give this act any such interpretation, or to apply it in a way that would produce such a result.

4. A further defense urged by the respondents is that the *Gorgona* having been engaged on a *per horam* basis, without reference to the success or failure of the undertaking, no recovery can be had on a salvage basis. This question presents a serious menace to the libellants' right to recover. That a salvage service was rendered; that there was an exposure to peril, imminent and critical; that the service rendered was voluntary in the legal acceptation of that term, must, under the proof, be determined in favor of the libellants. Neither will the fact that both vessels belonged to the United States, and the libellants were employees of the United States, and received their ordinary wages while engaged in the work of rescue, operate as a bar to their right of recovery. The sole question of their right to recover then, must be determined (a) by the terms of the contract entered into between the agent of respondents and the Canal Zone authorities, and (b) any change that may subsequently have arisen in the relationship of the parties, if any change did arise, which would affect the rights of the parties.

The proof before the court with reference to the execution of the contract is not satisfactory. All the Court has before it are the radio messages, the meager testimony of the witness Martin, the instructions given to Captain Howard, and the acts of the parties. Captain Sargent, with whom the arrangement was made on behalf of the Canal Zone, does not testify.

The witness, Robert A. Martin, testified that he is the manager of the Panama Agencies Company, who in turn are the agents for the United States Shipping Board Emergency Fleet Corporation on the Isthmus; that he had frequently employed the services of The Panama Canal; that on March 13, 1920, he called up the Marine Superintendent, after receiving a wireless that the ship was burning, and asked him what Canal equipment he had that witness could rent to render assistance; that they had no equipment as, he asserted, Admiral Johnson was lost in the bay and all the equipment was in use searching for him; that Captain Sargent told him that he would give witness the *Gorgona* just as soon as they could get hold of her; that shortly after they received word that Admiral Johnson was located, and Captain Sargent advised witness if it was satisfactory he would send the *Gorgona* to the relief of the *Olockson*; that he told him to do so as quickly as possible; that Captain Sargent sent a wireless to the *Gorgona* instructing her to proceed immediately to the *Olockson*; that witness had employed the *Gorgona* many times for the same purpose and always paid \$25 an hour from the time she leaves until she comes back regardless of the service performed, whether they are successful or not; that a bill was rendered for 93 hours from the time the tug left until she returned, at \$25 an hour; that the towage bill was paid

by the charterers of the ship on account of the Shipping Board; that his company is also agent for the Barber Line, the charterers of the *Olockson*, and the Barber Line actually paid the money, but he could not state whether the Shipping Board finally paid the bill or not; that he made an arrangement with Captain Sargent some years ago that at any time he could call up and arrange for a tug at \$25 an hour, and that rate is put in the regular Canal tariff; that they were also charged for the work done by the fire department, in fact, "for everything and plus;" that on the morning in question he arranged with Captain Sargent for the use of the tug at the regular rate and asked "if there was any salvage in this;" that Captain Sargent said as far as he was concerned he did not see that there was; that he asked this question as that in the first thing that would occur to any shipping man, but he did not think he asked seriously about it as he remembers Captain Sargent laughing about it; that the Master of the *Olockson* asked the crew to be paid off by wireless; and the crew returned to shore on the *Tacoma*.

Captain E. P. Jessop testified that he is the present Marine Superintendent of The Panama Canal, and has been since April 15, 1920; that he is in charge of the transportation and handling of shipping in the harbors of Colon and Balboa, transit through the Canal, and all marine equipment in charge of that work; that he knows the *Gorgona*; that she is a seagoing tug of 1,200 horsepower, belonging to The Panama Canal; and is used for the purpose of general service for shipping in the port of Balboa and elsewhere; that the tug "is employed for the necessary towing work about the harbor of Balboa; for offshore work in the nature of going out and picking up vessels that may be disabled or need towing in the Canal or Canal port;" that she is part of the public equipment of The Panama Canal, and the revenues derived from her services are used in the maintenance and operation of the Canal, and go into the Canal treasury.

Captain Howard, in command of the *Gorgona*, says he was shown the radiogram sent by Captain Jackson of the *Tacoma*, quoted above, and was told by Captain Sargent that he did not think he would have a chance of towing the *Olockson* in, and that he was sending him there to beach her wherever it was possible, to the closest land.

This statement of Captain Howard is the only positive evidence contained in the record, indicating the character of service the *Gorgona* was to perform.

The law seems clear that before services rendered under a contract can bar a salvage claim, the terms of the contract must be so plain and explicit that the court can reach no conclusion other than that a salvage recovery or compensation was expressly excluded. 35 Cyc.

730. And for the services so rendered the price to be paid must be certain, or capable of being made certain, and be paid in any event, whether the undertaking be successful or unsuccessful.

This instruction and application of the law is fully sustained in the case of the *Huntsville*, Fed. Cas. 6, 916.

The *Huntsville*, bound on a voyage from Savannah to New York, was discovered to be on fire. Charleston being the nearest port, her course was changed for that harbor. Upon arrival the city fire department was sent to her assistance, and succeeded in extinguishing the fire. Some question arose as to the right of the fire department to claim salvage for successfully saving the vessel from destruction, it being claimed it was the duty of the fire department to render its services to the public. This contention was decided adversely and a salvage claim permitted. It was further claimed, however, that there was an express agreement to pay for the services, and that only a *quantum meruit* could be recovered. As in the present case the proof concerning the agreement was not satisfactory. No specified sum was agreed upon. The contracting witness said he inquired the terms on which the assistance would be given, and was told the terms would be arranged, or in case of difference they could be settled. What was to be paid had the ship been lost was not discussed. In the case of the *Olockson* the terms are more definite than those in the *Huntsville* case but as fixing the principle upon which these contracts must be determined the language of the Court is quite clear. "A claim for compensation for salvage," says the Court, "may be lost if there has been a contract for compensation, without regard to the success of the efforts which have been used to save the property. But that contract which will bar a claim for salvage must be express, explicit and in distinct terms."

In the case of the *Silesia*, 2 Hagg. Adm. 265, Sir Christopher Robinson enunciated the rule with reference to indefinite and indistinct agreement. He said, referring to an indefinite conversation had before the service of the salvors had been engaged: "It is probable some such conversation may have passed at the beginning of the service, but it might not be known what would be the extent of it (the service), and the court is not in the habit of considering such loose conversations as conclusive of the merits of any case."

Dr. Lushington says, 7 Notes of Cases in Adm. & Ecc., page 363; "A sort of understanding will not bar a claim for salvage. * * * We must look to the service itself which was performed."

The case of the *Elfrida*, 172 U. S. 186, has been cited. In that case the sole question at issue was whether the contract had been procured through fraud and misrepresentation, and the court having concluded that no fraud entered into the negotiations between the parties, the contract was enforced.

That a contract to pay a fixed sum, irrespective of success, is binding upon both parties, can not be disputed, where the question of duress, fraud, or other elements that would avoid any contract, do not arise. The *Roanoke*, 50 Fed. 574; the *Commanche*, 8 Wall. 448; the *Emulous*, Fed. Cas. No. 4480; the *Elphricke*, 100 Fed. 945. But it must be a contract to perform a given service for a given sum. *Coffin vs. Shaw*, Fed. Cas. No. 2949; the *Adams*, Id. No. 55; *Hennessey vs. Varsailles*, Id. No. 6365; the *Centurion*, Id. No. 5554; the *H. B. Foster*, Id. No. 6290; the *Independence*, Id. 7014; the *Excelsior*, 123 U. S. 49. In this latter case salvage was allowed, although there was an agreement to settle the amount by arbitration. And to the same effect: the *Kimberley*, 40 Fed. 302.

Were the services of the *Gorgona* engaged under a contract "to perform a given service for a given sum?" If not does the contract which was made measure up to the requirements necessary in contracts of this character? Captain Howard says he was sent to beach the *Olockson* "wherever it was possible, to the closest land." The witness Martin says that, at the time he was negotiating for the services of the tug, he asked Captain Sargent "if there was any salvage in this," and that Captain Sargent replied that as far as he was concerned he did not see that there was. This, the witness says, he regarded more as a pleasantry than as a serious feature of the negotiations. Categorically speaking, was the *Gorgona* employed to do what it did do? Is there in fact anything definite about the contract except the amount to be paid? Is a definite understanding concerning the consideration to be paid sufficient to support a contract of this character? Must not the purpose for which the hiring is made be also definite? If the use and possession of the *Gorgona* was acquired, irrespective of the service to be performed, was it other than a charter agreement, the consideration paid being for the hire without reference to the purpose?

Without entering into these questions, however, whatever may have been the relationship first established, did that relationship continue throughout? When Captain Howard arrived at the scene, the question of salvaging the *Olockson* was discussed with Captain Jackson, of the *Tacoma*, and Captain Endreson, of the *Olockson*. Mention was made by Captain Howard that Captain Sargent had requested that Captain Jackson shell and sink the *Olockson* with the batteries of the *Tacoma*. To this suggestion Captain Jackson demurred, stating he could not do this without orders from the 15th Naval District. Captain Endreson said he thought this was the only thing to do, and in response to a suggestion from Captain Howard that he would undertake to tow his boat if his (Captain Endreson's) men would affix the hawser, but Captain Endreson said such a thing

was ridiculous; that both the Captain of the British steamship *Salvador* and the American steamship *Lake Fitch* had stated the day before that it was unsafe to attempt to board the *Olockson* and he would not order his men to take the risk. This conversation is verified by the witnesses Maner and Anderson, the latter of whom says: "Captain Endreson said he would not order his men to go on the *Olockson*, it was too dangerous." Thus it will be seen that the crew of the *Olockson* had not only abandoned their ship, but their Captain refused to order them to return for the purpose of affixing a towing line. At the conclusion of this conference Captains Howard, Endreson, and Jackson boarded the tug *Gorgona*, approached the burning ship against the advice of a member of his crew who was a member of the Balboa Fire Department. At the instant when the tug was brought up at the break of the forecastle head, the two sailors, libellants Anderson and Maner, without orders, scrambled up the ship's bulwarks, and running to the front end, attached the towing tackle. The act of these men, worthy of all praise and commendation, determined whether the *Olockson* should be towed, beached, or sunk by the batteries of the *Tacoma*. After this action had been reported to Captain Sargent, Captain Howard received from him a radio message which read as follows:

You are authorized to use your own discretion with regards to any requests made by Master *Olockson* as to disposition that vessel.

Whatever may have been the original relationship of the parties, this message unquestionably changed that attitude. By the terms of this message Captain Howard was free to exercise his own discretion, either to follow his original orders to sink or beach, or follow any request which Captain Endreson might make with reference to final disposition. By virtue of this message the fate of the *Olockson* was entirely in his hands. He could hazard the safety of his crew and his vessel or not at his own discretion.

There will be found few recitals that speak more eloquently of the heroism of seamen than will be found in the annals of the services rendered by the crew of the *Gorgona* during the four days they were engaged in towing the *Olockson*. Nothing short of a positive legal mandate would justify a court in withholding compensation from men of the daring and courage which these men are shown to have possessed. Without their efforts, rendered at a time when there was no legal obligation resting on them, the *Olockson* and her entire cargo must have perished—whatever was salvaged was due to their efforts solely. On the whole case the Court is of the opinion there exists no legal barrier that would positively prohibit it from making some reward to these men, not to the extent claimed, but substantial under all the circumstances; and in reaching this conclusion the

Court has not only resolved all legal doubts in their favor, but has kept in mind at the same time the spirit of the law which would make a salvage service a reward of merit, rather than a prey upon those in distress.

5. In determining what allowance shall be made to the salvors there are numerous facts and circumstances that must be taken into consideration. No expression of the court can be so construed that it would even savor of a disposition to minimize the very commendable conduct of the *Gorgona* crew, from the time the *Olockson* was first sighted until she was beached in Balboa Harbor. With no apparent thought of salvage they braved every peril and overcame every obstacle in what appeared to be a hopeless, if not impossible, undertaking. Their action is worthy of all commendation.

There are, however, in making a material reward for the services rendered, certain facts that must be taken into consideration. The tug belonged to the United States. Its crew were employees of the United States. It left Balboa Harbor under orders from the port captain. When it arrived at the scene of disaster, a departure from the purpose for which it was sent, it is true, became necessary, and the undertaking became one of personal risk to the crew, but in taking their risk, they incurred no risk with respect to the tug. A property worth probably \$250,000 was used by them without risk of personal loss. In most salvage cases the salvors not only incur a personal but a property risk as well. Had the *Gorgona* been ruined or lost, the loss incurred would have fallen on the owners and not on any member of her crew.

Counsel for libellants have been at great pains to furnish the Court with a long list of authorities, from the foundation of the Government, showing the awards that have been made by the courts under every possible situation. The Court must not be considered as ignorant of the fact that under the present day methods of salvage a *per centum* basis can no longer be considered. The *Kia Ora*, 252 Fed. 507. In the days when salvage was accomplished through aid given by one sailing vessel to another, with about as much risk to the salvors as the salved, and where, too, the values involved were much less than they are to-day, a *per centum* basis was a fair and just method as could be followed by the courts. Under modern conditions, however, when practically the entire seagoing fleets of the world are steam vessels of a construction that is as nearly indestructible as modern ingenuity can devise; when the rescuing craft is usually a tug particularly constructed for that character of service, with the personal risk reduced to almost the vanishing point, allowances can no longer be made on the basis that was found to be just and proper in the days of the sailing vessel. Consequently, there is manifest

a growing tendency on the part of the courts to take into consideration the seafaring changes that have been the outgrowth of later improved conditions in the construction of merchant vessels, and to make awards that will bear a fair relation to the risk incurred, both by the crew and the craft; the time employed; the value of the property salvaged; the value of the salving vessel; the peril of the ship and cargo rescued, and from all these make such allowance as would be fair to all interests involved. In the case of the *Olockson* no claim is made by the owner of the vessel, by the fire department which rendered a valuable service after the vessel had arrived in Balboa Harbor, or by any agency or factor involved in the rescue, save the crew of the *Gorgona*. Of course no part of the allowance waived by others can be diverted to those making claim. The allowance in the present case must be as though all entitled to claim had claimed, and from such claims that part of the whole which would have been the fair proportion of the *Gorgona* crew be now allowed.

The value of the cargo has been determined. The sum of \$178,000 it is agreed was the amount for which the gasoline was sold. The value of the ship is more difficult. The libellants claim the appraised value of \$900,000. The respondent company admitted in its answer a value of \$100,000, and at the trial filed an amended answer denying any value. Out of these figures a salvage award of \$300,000 for the vessel and \$59,333.33 for the cargo, or a total, for the *Gorgona* crew, of \$359,333.33 is asked. These claims are impossible.

In the recent case of the *Kia Ora*, 252 Fed. 507, there was an award made by the Circuit Court of Appeals of \$150,000 upon a valuation of \$3,900,000 for cargo and ship, or a trifle less than 4 per cent. This was a vessel with a net cargo of 11,800 tons; the value of the salvor's ship was \$450,000, and 70 men were engaged for 6 days.

In the case of the *St. Paul*, 82 Fed. 104, and 86 Fed. 340, the vessel was worth \$2,000,000, and was carrying a cargo of equal value. The rescuing vessels were valued at \$400,000, with crews amounting to 207 men, engaged 11 days. An award of \$150,000 was made for vessel and cargo, or less than 4 per cent.

In the *Milderskin*, 249 Fed. 776, the vessel and cargo were valued at \$1,450,000. She was rescued by the *Hesperides*, valued at \$328,000, including freight aboard. It appears from the facts of this case that the *Milderskin* was a vessel of 4,000 gross tons; that she was a helpless drift among the Bahama Islands, having been carried 200 knots out of her course. In this condition she was taken by the *Hesperides* and towed for a distance of 819 knots, one of the largest tows on record. For her services the *Hesperides* was allowed the sum of \$45,000, and expenses amounting to about \$2,000, or a trifle over 3 per cent.

In none of these cases was an allowance made on a *per centum* basis, the award in each instance being in gross.

Accepting the admitted valuation of the *Olockson* to have been \$100,000 and the cargo to have been \$178,000, it is the conclusion of the court that, under all the circumstances, an allowance of \$15,000 to the crew of the *Gorgona* would be a fair and just compensation. If the *per centum* basis were followed, and all those entitled to claim had claimed, this would represent a 20 to 25 *per centum* on the total valuation of the ship and cargo, which would be rather in excess of the allowances in the cases cited.

Of this amount the *Olockson* will bear \$5,500, and the cargo \$9,500.

The allotment among the libellants is reserved for the further orders of the court.

TERAN *versus* SMITH, *et al.*

(District Court, Canal Zone, Balboa Division, September 24, 1921.)

Civil No. 451.

1. ACTIONS. LOCAL AND TRANSITORY. JURISDICTION.

An action in tort for damages resulting from cutting off the water supply to real property in Panama owned by a resident of Panama is a local and not a transitory action, and this court has no jurisdiction of the cause of action.

Attorney for plaintiff, *Oscar Teran*.

Attorney for defendant, *A. C. Hindman*, United States District Attorney.

KERR, District Judge. The plaintiff, a resident of the city of Panama sues the defendants in tort, alleging as a cause of action that they, either personally or through their authorized agents, had entered his premises in the city of Panama and cut off the water therefrom, and condemned his property as unsanitary on account thereof; that these acts were committed by the defendants for the alleged reason that he had not paid the water rent as required by the rules and regulations of the water company.

The defendant Smith is a resident of the Canal Zone, and is Auditor of the Government of the Canal Zone, and as such is charged with the duty of auditing the accounts of the patrons of the "Panama Water Company," collect the rentals, read the meters, and enforce the regulations of the company.

The defendant Goldthwaite is also a resident of the Canal Zone and is Chief Sanitary Officer of the city of Panama, and charged with the duties of maintaining the health and sanitation of the city of Panama as provided in the treaty between the United States and

the Republic of Panama, and as such officer may condemn any property regarded by him as unsanitary and dangerous to the public health.

It is alleged by the plaintiff that he is the owner of sundry residences in the city of Panama, and as such is a patron of the Panama Water Company; that since he became a patron it has been his custom to pay the rentals quarterly by mailing to the company his check in payment of the water used by him for the past quarter; that on the present occasion he mailed his check before the expiration of the time limit for discount on his bills in ample time for it to have been received by the water company before the expiration of the limit, but that the company neglected to secure the check so mailed from the post office until after the limit had expired, and thereupon turned off the water from his premises and posted a notice of condemnation on his premises; that by reason of these acts he had been deprived of the use of water for his houses, containing something near 100 tenants, and in consequence many of his tenants had been compelled to move and abandon their homes, and that he had thereby suffered a personal loss of \$1,000, and been occasioned a loss of \$10,000 for the tortious acts of the defendants, committed by them in a spirit of maliciousness.

A demurrer has been filed to this petition based on the contention that this court has no jurisdiction for the reason that the cause of action arose in the city of Panama, for injury done to real property situated therein. The sole question presented to the court, therefore, on this defense is whether this is a local or a transitory action.

What is a local and what is a transitory action is not always easy of ascertainment. In many of the States of the United States the form has been abolished, and pretty much all actions of tort made transitory, but in those jurisdictions where there exists no code provisions to this effect the common-law distinctions still prevail. That an injury to real property is a local action is too well settled to admit of argument. This the plaintiff admits, but in doing so takes the position that this is a personal action, for a personal injury, and therefore of such transitory character that a suit can be maintained wherever the defendants may be found. The soundness of this position must be determined by the facts alleged in the petition, the truthfulness of which the demurrer admits. The plaintiff is the owner of a large rental property in the city of Panama; the foundation of his cause of action grows out of the alleged tortious conduct of the defendants in illegally cutting off the water from his property, and condemning it as unsanitary. The simple distinction to be drawn between a local and a transitory action, following the mass of decisions on the subject, seem to turn on the question of whether the

act done could have been done at any place other than where it was done, or if it was an act that could have been done anywhere. Was then the acts performed by the defendants of that character that could not have been performed elsewhere than where they were performed, or could they have been performed anywhere. The whole contention is admirably expressed in 40 Cyc. p. 83: "In an action for a tort, it is the county in which occurred the act, of omission or commission, that violates the plaintiff's rights" which determines the venue. Applying this authority to the facts of the present case it would seem that the acts complained of having been committed in the city of Panama, and being to the injury of plaintiff through injury to his realty, they could not have been committed any place, except where they were committed. A case is presented which is wholly different from that of an assault upon the person or for an injury to personal property. It must be plain that the water that was turned from plaintiff's property could not have been turned any place other than the place where the property is situated, and this being the cause of action alleged by the plaintiff, and the acts of the defendants being limited solely to the property and not the person of the defendant, it must follow that this court has no jurisdiction.

Whether the court could entertain an action against these defendants, even if it had an undisputed jurisdiction, by reason of the fact that they are public ministerial officers, and acted solely in their official capacity, need not be considered, since the court has already reached the conclusion that it has no jurisdiction.

The demurrer to the jurisdiction will be sustained.

BARRETT *versus* BARRETT.

(District Court, Canal Zone, Balboa Division, October 1, 1921.)

Civil No. 506.

1. DIVORCE. JURISDICTION. FOREIGN LAW.

The Civil Code authorizes a divorce only *a mensa et thoro*. There is no law in the Canal Zone authorizing divorce *a vinculo matrimonii*. The fact that the parties were married in Kansas, where an absolute divorce may be granted, does not give this court jurisdiction to grant a divorce according to the laws of Kansas. In the absence of a statute giving such right this court has no jurisdiction to grant an absolute divorce.

Attorneys for plaintiff, *Todd and McIntyre*.

Attorney for defendant, *Oscar Teran*.

KERR, District Judge. The plaintiff is an American citizen and a resident of the Canal Zone. The defendant was a former resident

of the Canal Zone, but her present whereabouts are not known. When last heard from she was residing in Chicago, Illinois.

The plaintiff alleges that he was married to the defendant on the 22d day of December, 1901, in the State of Kansas; and that they lived together as husband and wife until the month of May, 1919, when the defendant abandoned him, and has since refused to live with him. The plaintiff seeks an absolute divorce from the defendant, his wife, on the ground of abandonment, alleging that an abandonment for 1 year is a ground of divorce in the State of Kansas.

The demurrer raises the question of jurisdiction of this court to grant a divorce *a vinculo*.

Counsel for the plaintiff contends that this court has undisputed jurisdiction to grant an absolute divorce under Sections 154-168, inclusive, of the Civil Code of Panama. Art. 154 provides as follows:

Art. 154. The following are grounds for divorce:

1. Adultery on the part of the wife.
2. Concubinage on the part of the husband.
3. Habitual drunkenness of one of the spouses.
4. The absolute abandonment on the part of the wife of the duties of a wife and mother, and the absolute abandonment on the part of the husband of the fulfillment of the duties of a husband and father.
5. Cruel treatment, assault, if the life of the spouses is endangered thereby, or domestic peace and harmony are rendered impossible.

The laws enacted by the Isthmian Canal Commission for the Government of the Canal Zone do not make any provision for the granting of a divorce.

The Code of Civil Procedure of the Canal Zone is silent on the subject.

The several laws enacted by the various Presidents in the form of Executive Orders make no provision for a disunion, though there are several provisions for effectuating a union.

In none of the treaties and acts of Congress does there appear to be any provision with reference to the subject of divorce.

If, then, this court has any power to grant a divorce it must derive that power from the Civil Code of the Republic of Panama, and if it derives any such power from that code it follows that those powers, to a great extent, at least, must be interpreted by the construction put thereon by its courts and its law-making powers.

It is argued by counsel for plaintiff that when the Congress of the United States conferred on the courts of this Zone a general equity power, the conferring of that power carried with it an equitable jurisdiction in all matters of divorce. The soundness of this position may be questioned. The right to grant an absolute divorce is not inherent equitable relief. A court of equity may annul a marriage contract for fraud, duress, misrepresentation, or for any other ground

that would be ground for annulling any civil contract, but it does not follow that it may grant a divorce. The power to grant a divorce must be conferred upon the courts by legislative action, and the grounds upon which a divorce can be granted must be statutory, and the power of the courts over the subject of divorce must be confined to the causes enumerated in the statute. The grounds upon which a divorce can be granted must be prescribed by the legislative branch of government, and those grounds can neither be enlarged nor abridged by the courts. If, then, as contended, this court has the power to grant an absolute divorce, that power and that right must of necessity have been prescribed by some legislative body. If the laws of Panama, or of Colombia, be in effect in the Canal Zone, with respect to the subject of divorce, whether by treaty or Executive Pronouncement, do those laws authorize this court to grant such a divorce as is sought by the plaintiff in this action?

Article 153 of the Civil Code of the Republic of Panama provides as follows:

A divorce does not dissolve a marriage, but suspends the common life of the marriage.

If a divorce, under the law of Panama, does not dissolve the marriage, the word, or term, "divorce" is not used in its code in the same sense that it is used in the courts of the United States. When, therefore, provision is made in Article 154 for granting a divorce for the causes enumerated, an absolute divorce was not contemplated, it merely "suspends the common life of the marriage," that is, a mere separation only is granted. That such is clearly the meaning of the word divorce is made manifest by the fact that there are in the Civil Code of Panama, immediately preceding the articles of divorce, sundry provisions for the annulment of marriages, the causes therefore being set forth in clear and unmistakable terms. The argument of counsel that the provisions of Article 153 is merely to withhold from the civil tribunals the jurisdiction to decree absolute divorce in Catholic marriages does not coincide with the interpretation placed on the provisions of the code by this court, when it undertakes to reconcile all of its provisions with respect to the marital relations. The courts may annul a marriage for the causes enumerated in the code, and they may grant a separation for the causes enumerated, but the power to grant an absolute divorce is nowhere given in the code that was recognized by the Isthmian Canal Commission. It seems clear that the use of the word "nullity" as used in the Panama Code has relation solely to the contract, and that the term "divorce" has reference solely to the relation of the parties. The only act of the parties which will work a dissolution is death (Art. 152) and that is not pleaded in this action.

It is alleged by the plaintiff that separation, or abandonment for a period of 1 year is a cause of divorce in the State of Kansas, where the parties were married. This may be true, but the cause of divorce, if any exists, arose in the Canal Zone. If this court were called upon to enforce the divorce laws of all the States and Nations where the parties were married, it would soon be one of the largest divorce marts in the civilized world. If the cause of divorce had arisen in Kansas this court, under its broad powers of jurisdiction, might give relief, provided the laws of Kansas were properly alleged and proved, but where the cause of action arises in the Canal Zone, the laws of the State where the parties were married have no more effect than if the parties had been married in Europe or Africa.

Into the ecumenical, ecclesiastical and historical aspects of the subject, from Moses down to President Roosevelt, the court has not entered, although counsel have graciously extended the opportunity so to do.

The court is reluctant to depart from what seems to be an established precedent, but after a careful consideration of the subject it feels impeled to refuse the assumption of a jurisdiction it does not believe it possesses.

The demurrer will be sustained and the petition dismissed.

DIAZ, *et al.*, versus PATTERSON.

(District Court, Canal Zone, Balboa Division, November 1, 1921.)

Civil No. 199.

1. JUDGMENTS. VACATION OF. TERM OF COURT.

A term of court begins at time fixed by order of the District Court under the terms of The Panama Canal Act. It ends at the time fixed by rule or statute or on adjournment *sine die* during the term. At the end of the term, either as a result of such adjournment or by operation of law, the court loses control of its judgments entered during such term and may not thereafter vacate or set them aside unless authorized to do so by some other provision of law.

Attorneys for plaintiffs, *Harmodio Arias* and *C. P. Fairman*.

Attorneys for defendant, *Todd* and *McIntyre*.

KERR, District Judge. The plaintiffs have filed a motion asking the court to vacate a judgment that was entered in this action at a trial had in the month of May, 1921, alleging as the basis of their motion that the judge of the court, then sitting, was prejudiced in favor of the defendant, which prejudice is alleged to have exhibited itself in sundry ways, such as entertaining the defendant and his

wife at his private residence a few days before the trial of the action, and for sundry remarks to the effect that he did not intend to see Diaz rob Patterson, or words of that import. On this issue, incident to these charges, sundry witnesses have testified, and their testimony has been reduced to writing. It does not appear from this testimony whether the alleged remarks of the trial judge were made before, during the progress of, or after the trial had been concluded. No ground for vacation is alleged based on any fact which appears of record in the action, the motion being based solely upon facts *de hors* the record.

Haply this court feels it may be relieved of the embarrassment of passing upon the causes alleged in the motion, as touching the conduct of the former judge, for the reason that the question presented is solely one of law, and not of fact in the present status of the case.

This cause was tried at the May session of the court. Judgment was rendered by the trial judge in favor of the defendant Patterson, exceptions saved by the plaintiffs and appeal prayed to the Circuit Court of Appeals at New Orleans. At the conclusion of the session of the court at which this trial was had a final order of adjournment was entered in these words:

There being no other business before the court the court is adjourned *sine die*.

This order was entered on the 4th day of June, 1921. Judge Hanan resigned as judge of the court to become effective on July 15th, following; and on that day the present incumbent became judge of the court under appointment by the President.

It seems to be fairly well conceded by counsel for each side that the court loses all control over its judgments after the term at which the judgment is rendered has expired. Whether so conceded or not, no rule of law is better established. The leading case upon the subject appears to be that of *Bronson vs. Schulten*, 104 U. S. 410.

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there

is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.

In the previous case of the Bank of the United States *vs.* Moss, 6 Howard (47 U. S.), all of the cases prior thereto bearing upon the subject are collected and commented upon, forming a list too long to be here enumerated.

In Brooks *vs.* Railroad Company, 102 U. S. 107, the same question is decided, the language of the court being:

A petition for rehearing after the judgment can not be filed except at the term at which the judgment was entered.

The cases of Bronson *vs.* Schulten and Brooks *vs.* Railroad Company are supported by the following adjudicated cases:

Federal Case 2059.

Federal Case 842.

Federal Reporter, page 373, Vol. 65.

Federal Reporter, page 833, Vol. 55.

Cameron *vs.* McRoberts, 3 Wheaton 591.

King *vs.* Brook, 72 Pa. 364.

Conceding that a judgment can not be vacated after the term at which it is rendered the question is made that there are no term periods under the Canal Zone practice, and that, therefore, the rule with reference to vacating judgments after the expiration of a term has no application in the present case. This is a matter which addresses itself to the serious consideration of the court. It is hardly conceivable that there can be a court in which there is neither a beginning nor an ending. The last order entered by Judge Hanan was a *sine die* order. The courts have universally held that a *sine die* order entered by a court ends the term at which such order is made. As was said in Union Pacific Railway Company *vs.* Hand, 7 Kansas 386:

"A court having once opened it continues till the term expires, or an adjournment *sine die* is made."

When, therefore, Judge Hanan entered an order adjourning the court *sine die*, and held no session or term of the court thereafter, no matter when that term began, or what may have been the rules of court with respect to terms, that term was at an end.

In Pitman *vs.* United States, 45 Fed. 159, the word "term" is clearly defined:

The term is that session of the court which begins at a time fixed by or under authority of law, and having proceeded continuously, ends when the business then under consideration is concluded.

Lipari *vs.* State, 19 Texas Appeals 431, is to the same effect:

The word "term" when used with reference to a court, signifies the space of time during which the court holds a session.

See also Emerson *vs.* M. K. & T. Railway, 82 S. W. 1020.

The term continues until final adjournment, or until lapse of time by operation of law, and when an order of final adjournment has been entered, or the time designated by law as constituting a term has expired, the term ends.

State vs. Maddock, 115 Pacific 426.

Ter. of New Mexico vs. Armijo, 89 Pacific 267.

It would seem, then, from the authorities quoted here, and there are many others to the same effect, that a term of court ends with a final order of adjournment, irrespective of what may be the rules of court, and that all control over its judgments is lost after such adjournment has been had, except in those jurisdictions where there is an express statutory provision fixing the period within which a court may review, annul, vacate, or modify its decrees.

The contention of counsel that the rules in existence at the time this cause was tried can not be relied upon by defendant as fixing the term periods is open to the criticism that the act of Congress establishing the present district court provides that the district judge may designate by order the time when a session or term of court shall be held, provided there shall be a session or term of court at least once a month in each division. The fixing of the times when courts shall be held is determined by the court, and in the making of this order the President has no part, it is only in the making of the rules of practice that the consent of the President may be obtained, and the rule established by the former judge was that there should be a term in each division once a month, fixing the times at which such terms should begin and end. The contention of counsel, therefore, that no term could be established except by rules approved by the President is not supported by the wording of the act itself, so it must follow that the order of the court fixing the terms of court was a binding order.

The petitions filed by Arosemena and Aleman present an entirely different question. If they have been precluded by the judgment heretofore entered their rights have ceased; if their rights have not been precluded such rights as they have can be determined upon a hearing of their petition. Upon these questions no opinion can be expressed in advance of a hearing.

The motion which has been made seeking a vacation of the judgment can not be regarded as a bill of review for the reason that it does not seek to set aside the judgment for any error of law which appears in the record. Most of the facts alleged were in the knowledge of the parties before the final adjournment of the court according to the testimony of Mr. Fairman, and should have been embraced in a motion made before the term ended at which the judgment was

rendered. He gives as a reason for not so doing it would not have been of any avail. Even if this be true, it would have been in the record for consideration by the appellate court.

Having reached the conclusion that the court has lost all control over the judgment that was entered by Judge Hanan, and that there is no order which it can now enter, except to overrule the motion to vacate that judgment, it will be unnecessary to consider or comment upon the evidence which was produced at the hearing. The court entertains no doubt that it is powerless to grant the relief sought. The motion to vacate, therefore, must be overruled.

If plaintiffs so desire the proof which has been taken, and which by stipulation may hereafter be placed in the record, may be certified to the Circuit Court of Appeals for such disposition as that court may determine is proper under all the circumstances. Having lost control over the judgment this court does not, however, feel that it has the power to make the proof so taken a part of the record.

SHAW *versus* BERGEN POINT IRON WORKS.

(District Court, Canal Zone, Balboa Division, October 15, 1921.)

Civil No. 144.

1. ACTIONS. SUITS IN FORMA PAUPERIS.

An American citizen only is entitled to sue *in forma pauperis*. Where an action is so prosecuted to final judgment in this court, and on appeal by defendant the cause is reversed, the plaintiff may not be required to pay costs on appeal as a condition precedent to further prosecution of his suit.

Attorney for plaintiff, *E. M. Robinson*.

Attorney for Defendant, *C. P. Fairman*.

KERR, District Judge. This action was prosecuted in this court *in forma pauperis*. A judgment was rendered for \$7,500, and appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. That court, upon hearing, reversed the judgment of this court and the action was remanded for further proceedings in accordance with the judgment there rendered.

Counsel for defendant has filed in this court, upon the redocketing of the case, a motion to require the plaintiff to pay the costs incurred on appeal as a condition precedent to his right to further prosecute his action.

Sundry authorities have been submitted in support of this motion. None of these authorities, upon examination, seem to be in point.

The Congress of the United States by Act of July 20, 1892, Ch. 209, 27 Stat. L. 252, provided that "Any citizen of the United States,

entitled to commence any suit or action, in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor, before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress which he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action."

This act was amended by Act of June 25, 1910, Ch. 435, which amended act reads as follows:

That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal.

Prior to the passage of this amendment the right to proceed *in forma pauperis* was not absolute, but was a matter of judicial discretion upon proper showing; the right to defend as a poor person did not exist, nor was there any authority given which permitted a poor person to proceed as such in the courts of appeal. A comparison of these two acts reveals the fact that the sole changes wrought have been to bring the defendants within the statute, and to extend its provisions to allowance in writs of error or appeal. *Kinney vs. Plymouth Rock Squab Co.*, 236 U. S. 43. No reason is assigned by counsel in support of the motion made on behalf of defendant other than a failure to pay the costs of appeal adjudged against the plaintiff. It has been held in numerous cases that the right to sue as a poor person did not exist where counsel for the complainant had been employed on a contingency, and therefore had an interest in the recovery, unless he too made an affidavit as required by the statute. *Silvas vs. Arizona Copper Co.*, 213 Fed. 504, and cases cited. This question, however, has not been raised.

It will be noticed the language of the amended statute grants the privilege to any citizen of the United States, upon a proper order of the court to "commence and prosecute or defend to conclusion any suit or action, * * * or an appeal to the Circuit Court of Appeals

or the Supreme Court in such suit or action." This action, upon appeal, was reversed because of errors of law committed by the trial court. Over these errors the plaintiff had no control. The reversal was for the benefit of the defendant. To now hold that the plaintiff could not prosecute the action in accordance with the directions of the Circuit Court of Appeals because of an error committed by the trial court would seem to be equivalent to denying the right in the first instance, and thereby render nugatory the very purpose of the statute by denying the plaintiff the right to prosecute his action to conclusion.

The privilege of suing *in forma pauperis* is extended by the provisions of this act to any citizen of the United States who may secure permission so to do from the court before commencement of action. The statute creating this court, by express provision, grants the right of appeal from its judgments to the Circuit Court of Appeals sitting at New Orleans, or to the Supreme Court of the United States, and the right to prosecute *in forma pauperis* can be abridged or annulled by an act of Congress only.

The motion will be denied.

GOVERNMENT *versus* COX.

(District Court, Canal Zone, Balboa Division, November 19, 1921.)

Criminal No. 1857.

1. COURTS-MARTIAL. CIVIL COURTS. CONFLICT OF LAWS. FORMER JEOPARDY.

Where a member of the military organization is tried and convicted of an offense by a court martial, he can not thereafter be tried, convicted and punished by the civil courts for the same offense. But if the offense charged in the civil court is different from that on which the defendant was tried and convicted in the court-martial, such conviction by the court-martial does not bar the trial and punishment of the defendant in the civil courts even though the facts in each case are the same.

Attorney for Government, *J. J. McGuigan*, Assistant District Attorney.

Attorney for defendant, Lieut. Col. *A. W. Brown*.

KERR, District Judge. This prosecution has been submitted to the court upon the following agreed statement of facts:

On the 17th day of September, 1921, and for some weeks prior to that date, Lewis R. Cox, the appellant, was a soldier in the Quartermaster Corps, U. S. Army, stationed at Corozal, Canal Zone, as a member of the Quartermaster Detachment of the Panama Quartermaster Depot.

The duties of private soldiers of the Quartermaster Detachment of the Panama Quartermaster Depot included the duty of guarding at night certain storehouses near the main highway passing through Corozal. While on the duty of guarding

these storehouses, a soldier was duly authorized and was required to carry a pistol. For the night of September 17-18, 1921, a Private Howell of the Quartermaster Detachment, a friend of Cox, had been duly detailed on this duty, which did not include the control of traffic on the main highway already referred to. The first sergeant had approved an arrangement whereby Cox might relieve Howell at 12 (midnight). Cox returned from Panama on the night of September 17, 1921, in an intoxicated condition and relieved Howell of his duties sometime prior to 11.45.

At 11.45 p. m. Cox stopped several automobiles which were proceeding along the main highway in the direction of Panama, which was outside the duty of watchman, as stated in the second paragraph hereof. The third car he stopped was driven by Errol J. Palmer. Cox stepped on the running board of Palmer's car with his pistol in his hand. Officer Becker at this time was standing behind the shrubbery less than 30 feet away. Cox held his pistol toward Palmer and said: "You God damned son of a bitch, I seen you speeding through here five or six times to-night, and I have a good mind to shoot you; but I am going to let you go this time, the same as I let the other fellows go, but the next time I catch you going through here I am going to shoot the ass off of you!" At this moment, while Cox was still on the running board of the car, Officer Becker grabbed his arm and took the revolver away from him. Officer Becker then telephoned the station commander, Sergeant Crosscup, who came out from Ancon to Corozal, and after getting in touch with Captain Griffith, the latter placed Cox under military arrest.

On September 20, 1921, Errol L. Palmer made affidavit before the magistrate at Balboa charging Cox with the offense of "Exhibiting a deadly weapon," under Section 292 of the Penal Code of the Canal Zone. A warrant was issued by the magistrate on the same date.

On October 6, 1921, Cox was arraigned before a special court-martial, appointed by Colonel Ladue, U. S. A., Commanding Officer of the Military Camp or Station of Corozal, Canal Zone, and tried by that court for the following offenses:

CHARGE I. Violation of the 96th Article of War.

Specification 1: In that Private Louis R. Cox, 6450174, Q. M. Det. P. Q. M. Depot, Corozal, C. Z., did at Corozal, C. Z., on or about the 17th day of September, 1921, wrongfully commit an assault upon one Errol J. Palmer, a chauffeur driving a licensed rent car, by ordering him to stop his car, and stepping upon the running board, draw a firearm and threatening him, by saying, "You God damned son of a bitch, if you don't cut out this speeding I'll blow your damned head off," and "I'll let you go this time, but if you pass here again I'll blow your ass off," or words to that effect.

CHARGE II. Violation of the 85th Article of War.

Specification 1: In that Private Louis R. Cox, 6450174, Q. M. Det. P. Q. M. Depot, Corozal, C. Z., was at Corozal, C. Z., on or about the 17th day of September, 1921, found drunk while on duty as watchman at Warehouse No. 12, Panama Quartermaster Depot, Corozal, C. Z., adjacent to Gaillard Highway.

Cox was acquitted of the violation of the 96th Article of War and the specification thereunder, but convicted of being drunk on duty and sentenced to forfeit twenty (20) days pay. This sentence was approved by the officer appointing the special court-martial.

Subsequent to approval of the sentence of the court-martial, Cox was tried in the Magistrate's Court at Balboa on the affidavit and warrant of September 20th.

The charge on which Cox was tried in Judge Blackburn's Court alleges that Cox "wilfully and unlawfully, not in necessary defense, in the presence of more than two persons, drew and exhibited a revolver, a deadly weapon, in a rude, threatening and angry manner."

The question presented to the court by this information is whether the trial before the special court-martial was a bar to the trial before Judge Blackburn, and this question in values only a determination by the court of the identify of the offense before the court-martial and the offense charged before the civil court.

The 96th Article of War reads as follows:

General Article. Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

The defendant was prosecuted before a special court-martial, duly appointed by the officer having such authority (or at least, the record does not show any thing to the contrary), for a violation of the article above set out. The specification of the charge is in the following language:

In that Private Louis R. Cox * * * did, at Corozal, C. Z., * * * wrongfully commit an assault upon one Errol J. Palmer, a chauffeur driving a licensed rent car, by ordering him to stop his car, and stepping upon the running board, draw a firearm and threatening him, by saying, etc. * * * .

Without considering at this time whether or not an assault is committed, within the meaning of the Criminal Code of the Canal Zone, when a threatening gesture is made, coupled with words which specifically place the performance of the act threatened at some future date and dependent upon the further actions of the person threatened, we will take up only the question of former jeopardy.

In the first place, it is a generally recognized principle that where the court or tribunal first hearing the cause has no jurisdiction over either the person or offense, its decision, whether of conviction or of acquittal, is void and no bar to a second prosecution for the same offense. Further, it was held in *in re Carter*, 97 Fed. 496, that where an offense is specifically provided for in any of the Articles of War prior to the 96th, the grant of jurisdiction to a court-martial to try and punish such offense is conferred by the particular article which mentions it, and not by the general language of the 96th Article. In other words, the defendant must be charged with and tried for a violation of that particular article, otherwise the proceeding will be void for lack of jurisdiction.

But a study of the articles prior to the 96th shows that no other article provides for the offense alleged to have been committed by Cox, unless the 90th Article is to be excepted; that article reads:

Provoking speeches or gestures. No person subject to military law shall use any reproachful or provoking speeches to another; and any person subject to military law who offends the provisions of this article shall be punished as a court-martial may direct.

And it seems apparent that the words "reproachful or provoking" are different and should be distinguished from actual threats such as the defendant here is charged with speaking. Nor does the 90th Article provide for the drawing and exhibiting of a firearm. Moreover, it has been held that disorderly conduct of an enlisted man in a town or public place, inducing arrest by the civil authorities, is such a disorder as shall be charged under the 96th Article. General Court-Martial Order No. 74 of 1892.

So far as concerns the jurisdiction of a special court to hear the offense charged, and the competency of its findings, the 13th Article unquestionably gives it this authority, as follows:

Special courts-martial shall have power to try any person subject to military laws, except an officer, for any crime or offense not capital made punishable by these articles. * * *

Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of 6 months, nor to adjudge forfeiture of more than 6 months' pay.

From the authorities cited, it is at once seen that the military court before which the defendant was first arraigned had ample jurisdiction to hear the case and to render a decision, as it did, within the limits prescribed by the 13th Article of War. Does, then, that trial constitute a bar to a second prosecution before this court?

Where the crime for which the defendant is indicted in the civil court is a separate offense from that charged against him in the court-martial proceeding, although growing out of the same act, the former trial by the military tribunal is no defense as against the civil prosecution.

Steiner's Case, 6 Op. Atty. Gen. 413;

Held, That a trial before a civil court on the charge of murder, where a soldier killed his superior officer, was no bar to a second prosecution before a court-martial for mutiny.

Howe's Case, 6 Op. Atty. Gen. 506;

Trial for manslaughter in civil court no bar to subsequent trial in court-martial for breach of duty, arising out of same act. U. S. *vs.* Clark, 31 Fed. 710.

But in *Ex parte* Reed, 100 U. S. 13, the Supreme Court of the United States specifically recognizes courts-martial as having competent jurisdiction to deal with offenses against any of the Articles of War; and the same jurisdiction is also upheld in *Ex parte* Mason, 105 U. S. 696; *Carter vs. Roberts*, 177 U. S. 496; and *Grafton vs. U. S.*, 206 U. S. 333.

In the *Grafton* case, the court held that where a soldier had been tried and acquitted on a charge of homicide before a court-martial having jurisdiction of the case, he could not afterwards be tried on a charge of assassination before a civil court of the Philippine Islands. In discussing the question of whether or not the two charges were

identical, Mr. Justice Harlan, who delivered the opinion of the court, quoted with approval the language of the Supreme Court of the Philippines, as follows:

The circumstance that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory. The identity of the offense is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy.

In the present case, Section 292 of the Penal Code of the Canal Zone reads as follows:

Every person who, not in necessary self-defense, in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, is guilty of a misdemeanor.

It is under this section that the defendant is prosecuted. The specification of the corresponding charge before the special court-martial alleges that the defendant assaulted one Palmer by "drawing a firearm and threatening him." Are these two offenses identical in their nature, within the criterion laid down by the Supreme Court of the Philippines and approved by the Supreme Court of the United States? Exhibiting a deadly weapon in a threatening manner and drawing a firearm and threatening another with it would seem to be so evidently the same in character as not to require discussion. The mere fact that the one also requires the additional circumstances of the presence of two or more witnesses is not regarded as material. If the special court hearing the case on the military charge found the defendant not guilty of drawing a firearm and threatening Palmer, it must necessarily have considered its finding facts which would also be a necessary element of the charge brought in the magistrate's court. It follows naturally then that to try the defendant again on those facts would be to place him twice in jeopardy.

There only remains for discussion the contention on the part of the prosecution that the Grafton case does not apply to and is not an authority controlling the courts of the Canal Zone, because it is based on a Congressional enactment, applying especially to the Philippines, which has not been made applicable in terms to the Canal Zone. But the Fifth Amendment to the Constitution of the United States recites that:

* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

And the Supreme Court of the United States, in the late case of *Panama R. R. Co. vs. Bosse*, 249 U. S. 41, in discussing the question of whether the doctrine of *respondeat superior* would apply in the

courts of the Canal Zone if it did not exist under the Colombian Civil Code, adopted by Executive Order of the President in May, 1904, said:

The Executive Order contained this passage, "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the Canal Zone * * * until altered or annulled by the said commission."

* * * The President's Order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private laws. * * * In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "inhabitants are familiar," in the language of the President's Order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men.

It is true that the above language in the Bosse case refers particularly to the interpretation and construction of a Colombian statute; but so in the present instance a Colombian law exists which prohibits the placing of a defendant twice in jeopardy for the same offense. Sec. 155, page 180, Laws of Canal Zone.

Having reached the conclusion that the offense for which Cox was tried in the military court is the same, in substance, as the charge in the civil court, it only remains for the court to dismiss the pending prosecution, and in this connection it may be stated that in all similar prosecutions where the offense charged is identical a trial in the military court will bar a trial in the civil court, but if the acts charged constitute two or more offenses a trial on one charge will not bar a trial on a different charge, even though the offense charged grows out of the same state of fact.

OTERO *versus* MARYLAND CASUALTY COMPANY.

(District Court, Canal Zone, Balboa Division, December 17, 1921.)

Civil No. 524.

1. PLEADING. COMPLAINT. SUFFICIENCY. EXHIBITS.

Attached to a complaint on an accident policy was a copy of the policy, which, by reference, was made a part of the complaint. Thereby it became a part of the complaint as fully as if set forth in the body thereof. The pleading of the policy did not, however, supply the lack of allegations of performance by the plaintiff and breach by the defendant. The lack of such allegations rendered the complaint demurrable, and the lack of proof made the action subject to dismissal.

2. PLEADING. COMPLAINT. CONDITIONS PRECEDENT.

Where the contract sued on names a condition precedent to be performed before action brought, plaintiff must allege performance thereof or complaint will be demurrable; and must prove performance of the condition precedent or the plaintiff's action may be dismissed.

3. ACTIONS. PREMATURELY BROUGHT.

Where a policy of insurance provides that action may not be brought until 90 days have elapsed for the furnishing of proofs of loss, the action will be deemed premature in the absence of allegation and proof that proofs of loss were given and that 90 days have elapsed since the giving thereof.

4. TRIAL. VERDICT. CURING DEFECTS.

A verdict may cure a defectively alleged cause of action but it will not cure the allegations of a defective cause of action, nor supply that in the cause of action which is lacking.

5. NEW TRIAL.

Where the plaintiff's complaint and proof are insufficient to sustain a judgment, judgment having been given for the plaintiff, and where it is manifest that substantial error has occurred or some fatal defect appears in the record, a new trial should be granted.

Attorneys for plaintiff, *Todd and McIntyre and C. P. Fairman.*

Attorney for defendant, *Felix E. Porter.*

KERR, District Judge. This cause is submitted on a motion for a new trial in support of which numerous grounds have been urged, only one of which need be considered. The pleadings do not present the real issue. However much the early Canal Zone codifiers may have desired to soften the rigors of the common-law form of pleading and procedure, there yet remain certain indispensable requisites which no amelioration can dispense with without abolishing all forms of pleading. The essentials of a contract, in order to state a cause of action, must be pleaded. When two or more persons enter into an agreement, in which agreement there are certain obligations imposed and assumed by each party, and there arises a breach of those obligations not only must the breach be alleged, but the duties to be performed by the plaintiff must likewise be stated in order that it may be seen he has himself complied with his part of the undertaking. In the present action, which is one involving liability on the part of the defendant growing out of an accident risk issued by the defendant to the plaintiff, there are certain prerequisites that must be performed by the plaintiff before liability is incurred by the defendant in actionable form. These are, in brief, notice to the defendant company that a liability has been incurred; notice that the liability has ceased, and asserting claim in the form of proofs submitted, and, lastly, an agreement to suspend action for a period of 90 days after such proofs should have been submitted. The allegations of the petitions covering these prerequisites, are in the following words:

Under the terms and conditions of the contract for "accident insurance," as aforesaid, and by reason of the injury suffered and sustained as hereinbefore set forth, the said defendant became and is indebted to the plaintiff in the sum of nine hundred and fifty (\$950) dollars, which although due notice of said injury has been given and payment thereof demanded, the same has not been paid, nor any part thereof.

Exactly what is meant by "due notice of said injury has been given" is not apparent. Notice of injury, proofs, and the lapse of 90 days after the submission of proofs are made necessary prerequisites to a right of action. "Due notice of said injury" may have been intended to include these requirements, if so the rigors of the common-law essentials have certainly not only been mollified but practically abandoned. It would take a most active and well-illuminated imagination to include these three essentials in this language. Even the author of this pleading is too good a lawyer not to admit, taken in consideration with the requirements of the exhibit which he filed with and made a part of his pleading, that the petition is demurrable.

But a more serious question than the failure of the plaintiff to allege a cause of action is presented in the failure of the defendant to demur, or to plead as a defense the prerequisites omitted to be plead by the plaintiff. Any of these, properly asserted, would have constituted a bar; if proven, a dismissal of the action. If he meant to waive them, and to present the only issue raised in the present form of the record, that of total disability, a new trial must be denied, because the court does not perceive any error in the proceedings on that issue which would warrant a new trial. That was a question of fact, properly presented to the jury, under what the court then considered, and now considers, proper instructions. There would be little trouble in reaching a conclusion if this were the only question to be considered. The early codifiers may have mollified the rigors but they certainly did not minimize the perplexities which their mollifications are capable of producing.

If under the present system of pleading it may successfully and reasonably be contended that the general denial by the defendant put in issue the requirements of the contract of insurance, a failure on the part of the plaintiff to prove that all the requirements of the policy had been met, must have resulted in a directed verdict by the court, and had the attention of the court been called to the requirement of failure to prove that 90 days had elapsed there would have been no alternative but to grant the motion made by defendant for a directed verdict at the conclusion of the plaintiff's testimony. Other and entirely different grounds were urged. These, on the issue made, were overruled as they should have been, but, there existing a failure in proof that did justify the granting of the motion, or a dismissal of the action, does it relieve the court of the responsibility of dismissing the action because the attorney for defendant did not call the attention of the court to a failure in the testimony with respect to this particular requirement of the contract? This is a question that has been the occasion of no little concern to the court. Every authority that could be found has been carefully considered in

the hope that some precedent might be found. Counsel for either side were requested to lend assistance in this search, but no assistance has been given.

The plaintiff is asserting a right which had not matured. "A condition precedent is one which delays the vesting of the right until the event happens." *Rapalje*. A condition precedent, under the California Code, 1903, Sec. 1436, is defined as "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

From these definitions it is apparent that the conditions in the policy were in fact conditions precedent, and a performance of these conditions was a necessary incident to the right to sue. The effect of filing an exhibit with a petition, without alleging a performance of its requirements has been considered by some of the courts. The petition in the present case refers to the contract of insurance in the following words:

Copy of said contract or policy of insurance is hereto annexed, marked Exhibit "A," and made a part hereof.

In *Georges vs. Kessler*, 131 Cal. 183, 63 Pac. 466, where a copy of the notice of lien was attached to and expressly made a part of the complaint, the Court said: "There can be no difference between setting forth such instrument in the body of the pleading and in annexing it as an exhibit and making it a part of the pleading by proper reference."

And in *Land Co. vs. Southern Pacific R. Co.*, 30 Cal. App. 223, 157 Pac. 634, the Court said: "As to the point that the complaint must be tested by its direct allegations, without reference to the language of the deeds attached as exhibits, we think the complaint, reciting, as it does, that the exhibits are made a part of the complaint, the effect of such recital is to make every part and parcel of the instrument a portion of the complaint." A rehearing of this case was denied by the Supreme Court of California, May 25, 1916.

In fact, the California rulings have gone so far as to hold that where a complaint refers to an exhibit attached thereto, the exhibit becomes a part of the complaint, although not expressly made a part by the language of the pleading. *Savings Bank vs. Burns*, 104 Cal. 473, 38 Pac. 102.

Under the Louisiana practice, where the defendant may demand oyer of documents, these documents, when annexed to the petition and made a part thereof, become incorporated therein as if fully set out.

Gray vs. Bank, 1 Rob. 533.

Lewy vs. Wilkinson, 135 La. 105, 64 So. 1003.

Hall vs. Ewing, 140 La. 907, 74 So. 190.

See also: *Somers vs. Hanson*, 78 Or. 429, 153 Pac. 43.

It is seen, therefore, under the authority of these decisions, that the conditions named in Otero's policy were in fact incorporated into the complaint. But it is also evident that those conditions, even if proved, do not of themselves supply a cause of action. In order for this to take place, the actual performance of the conditions, and not merely the conditions themselves, must be alleged. Certainly, the complaint contains no such allegation. Nor can the policy exhibit be so construed as adding strength to plaintiff's case by merely incorporating the necessary allegations; for in the first place, the policy does not, of course, contain any such statement of fact, and in the second, even though it did, it could not be held to add to the petition new and material statements which had been omitted from that pleading.

It is true, under the cases cited above, that by the general rule the contents of an exhibit are to be considered incorporated into the pleading to which the exhibit is attached. But it is also well settled that this rule is qualified to the extent that the statements and contents of the exhibit are considered a part of the pleading only in the sense that they explain and clarify the allegations. They do not save a pleading, otherwise defective, by adding a statement of facts which the pleader, through neglect or oversight, or possibly by intention, has failed to use. As the Court of Appeals of Kentucky has aptly phrased it, and exhibit can not be held to "make a bad petition good."

Commonwealth vs. Building Association, 118 Ky. 791.

Hudson vs. Scottish Union, etc., Co., 110 Ky. 722.

To the same effect are the following:

1. *Abadie vs. Berges*, 41 La. Ann. 281, 6 So. 529; in this case the Court said: "The mere fact of annexing the lease to the petition does not inject into that document an averment which is not in the lease, which if true, ought to have been set forth in the petition, which was not done.

This was a fatal omission, as the court is powerless to authorize an amendment which would insert a cause of action when none was previously averred.

2. *Malheur County vs. Carter*, 52 Or. 616, 98 Pac. 489. Here it was said: "An exhibit to a pleading can not serve the purpose of supplying necessary and material averments."

3. *Hoyt vs. Bentel*, 164 Cal. 680, 130 Pac. 432. In this case the court, after citing several prior California decisions in support of its position, said: "The mere annexing to a complaint of a contract providing that the purchaser shall have possession can not be treated as equivalent to an averment that possession was in fact transferred. To give such effect to the language of the complaint would be, in effect, a holding that the mere pleading in *haec verba* of a contract, constituted an allegation that all its terms had been performed.

These authorities establish beyond doubt that the petition was bad on demurrer. Had performance been alleged the general denial would have put the truth of performance in issue. But, there being

no allegation of performance, no demurrer having been filed, and no failure to comply having been pleaded by the defendant, does such failure on the part of defendant amount to a waiver? The more considered, the more perplexing the question becomes. Under the Canal Zone system, and under the practice which prevails in many States, a mere allegation of performance, without stating the facts, would be sufficient, but the petition in the present case contains no such allegation. The requirements of the policy may be stated. Sec. 14 provides as follows:

14. Written notice must be given to the corporation at Baltimore, Md., or to the agent countersigning this policy, as soon as may be reasonably possible, or any injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured or beneficiary, as the case may be. Affirmative proof of * * * duration of disability must be furnished to the corporation within 2 months from the termination of disability. * * * Legal proceedings for recovery hereunder may not be brought until after 3 months from date of filing final proofs at the corporation's home office.

The purport and the import of this provision are manifest, and mandatory in terms. Before the plaintiff could sue these conditions and requirements must have been performed. If not performed there must have been an allegation of failure to perform that would have excused failure, or there must have been an allegation of waiver on the part of the defendant. Assuming that the meager allegation of "due notice" covers the requirements with reference to notice of injury and proofs of injury after conclusion, and assuming that there was proof to sustain performance, there is neither proof nor allegation with reference to the 90-day provision. On the validity of this provision there have been numerous decisions of the courts. Some of the cases bearing on this point may be considered.

In *Chamberling vs. McCall*, 1 Am. Dec. 344, the Court said:

The clause in the policy that the loss should not be demanded till within 3 months after proof made, appears highly material. The parties have mutually stipulated that no duty shall arise till within a certain period after notice given of the loss, and the commencement of a suit before that time has elapsed is premature.

A like ruling was made in *Jackson vs. Southern Mutual Life Ins. Co.*, 36 Ga. 429.

When the obligation of a life insurance policy was to pay within "60 days after notice and proof of death" no recovery could be had until after the expiration of the time named.

Some courts have gone so far as to hold that even though the company announces that it will not pay, and will stand a lawsuit, if the policy contains a provision that suit can not be brought until a given time after proof of injury or loss have been submitted, the filing of a suit before the expiration of the designated period would be premature. *Quinn vs. Capital Ins. Co.*, 71 Iowa 615.

One of the leading cases upon this subject, being among the first of the courts to construe this character of provision in a policy of insurance, is that of *Doyle vs. Phoenix Ins. Co.*, 44 Cal. 264:

By the terms of the policy it is provided as follows: "The amount of loss or damage to be estimated according to the actual cash value of property at the time of the loss, and to be paid 60 days after due notice and proof of the same made by the assured," etc. It is objected that it does not appear from the allegations of the complaint that when the action was commenced this period of 60 days had elapsed. In answer to this point the respondent relies upon the following averments in the complaint:

That the plaintiff duly performed all the conditions on her part, in the said policy of insurance, to be performed. That she gave to defendant due notice and proof of the fire, and loss aforesaid, and demanded payment of the said sum of six hundred dollars; that no part of the same has been paid, and that the whole of said sum is now due, for which she demands judgment, etc.

The allegation that the sum "is now due" may be laid out of the case inasmuch as that is a conclusion of law merely. Nor does the averment that the plaintiff duly performed all the conditions on her part, in the said policy of insurance to be performed, and that she had given due notice and proof of the loss, aid the complaint in this respect.

Under the terms of the policy, the doing of these things would not give her an immediate right of action against the defendant for the payment of the sum demanded, for the defendant was not bound to pay until the lapse of 60 days thereafter. In a complaint filed on the very next day after the notice and proof had been given, it might have been alleged, with truth, that all these things had been done; and yet it will not be pretended that she would at that time have had a cause of action against the defendant, or that the latter was then in default because payment had not been made. The delay of the 60 days after notice, to which, under the terms of the policy, the defendant is entitled, is a substantial right secured by the stipulation of the contract, not merely to enable it to prepare to pay, but also to investigate the circumstances under which the loss occurred, with a view of determining whether or not the loss had been of such a character as involved an obligation upon its part to pay at all.

This decision is approved in *Cowan vs. Sams*, 78 Cal. 181, and more fully sustained in the latter case of *Gitten vs. Northern Insurance Co.*, 127 Cal. 483:

It has been held by this court in two well-considered cases that a complaint in an action of fire insurance, which failed to show that proofs had been made in accordance with the provisions of the policy 60 days before action begun, did not state a cause of action on such policy. (*Doyle vs. Phoenix Ins. Co.*, 44 Cal. 264; *Cowan vs. Phoenix Ins. Co.*, 78 Cal. 181.) In another case it is held that a nonsuit was properly granted in an action on a policy similar to this where the evidence showed that the suit was commenced before proofs were made. (*McCormick vs. North British Ins. Co.*, 78 Cal. 469). It is undoubtedly the settled law that a suit commenced within the 60 days, given by the policy for payment of the loss after proofs are made, is prematurely brought. This rule is recognized by appellant in his complaint when he states that due proofs of loss were furnished more than 60 days before the commencement of this action, but the evidence and findings are against him on this proposition. Of course, this proof of loss may, like any condition of a contract, be waived. But here, again, both the evidence and the findings as to the waiver are against appellant's contention.

The Supreme Court of Oklahoma, in *North British and Mercantile Ins. Co. vs. Lucky Strike Oil Co.*, 173 Pac. 847, has made a similar ruling:

The general denial in the answer required the plaintiff, as a condition precedent to recovery, to offer evidence of proof of loss being made as required by the terms of the policy, or a waiver of such proof, and the plaintiff having failed to offer any evidence whatever tending to show that the proof of loss was made within 60 days after the occurrence of the fire as required by the terms of the policy, or that such proof had been waived, the evidence fails to sustain the cause of action, and the demurrer to the evidence and the motion for an instructed verdict were well taken, and the court committed reversible error in overruling the demurrer to the evidence and likewise the motion for an instructed verdict, as the making of proof of loss was not waived by the answer setting up other grounds as a defense to the action, or in denying liability upon the contract of insurance; it not being shown that such denial of liability was made within 60 days after the fire occurred.

In *Palatine Ins. Co. vs. Lynn*, 42 Okl. 486, 141 Pac. 1167, it is held:

(1) In an action on a fire insurance policy, which provides that in case of loss the insured will give immediate notice to the insurer, and within 60 days thereafter furnish proofs of loss, testimony that such proofs of loss were furnished is necessary in order to establish a cause of action, unless the making of such proof of loss has been waived by the insurer.

(2) A waiver of proofs of loss might be pleaded in the petition in order that the evidence thereof may be admissible at the trial. Such proofs are not waived by an answer setting up other grounds as a defense to the action.

(3) Where it is alleged in the petition that proofs of loss were furnished as provided in the policy, these allegations are put in issue by a general denial in the answer, and if at the trial no evidence is offered that such proofs have been furnished, there is a failure of proof, and a demurrer to the evidence is well taken on the ground that the testimony is not sufficient to support a judgment against the insurer, and the motion for an instructed verdict is likewise well taken.

The holding in *Palatine Ins. Co. vs. Lynn*, *supra*, finds support in *Westchester Ins. Co. vs. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029; *Smith vs. State Ins. Co.*, 64 Iowa 716, 21 N. W. 154; *Lane vs. St. Paul Fire & Marine Ins. Co.*, 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197.

There is no evidence tending to show that the defendant within 60 days after the fire occurred denied liability, and it is not so pleaded in the petition, or proved by evidence, and therefore the waiver of proof of loss by such denial is not shown, and there being no evidence that proof of loss was made, or waived, within the time prescribed by the policy, the plaintiff failed to make out its case.

In *St. Paul Fire Ins. Co. vs. Mittendorf*, 34 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651, it is held:

In an action on an insurance policy, the plaintiff must allege and prove a compliance with the conditions precedent in the policy, or a waiver thereof.

In construing the provisions of an insurance policy containing a clause similar to the one in this policy the District Court of Louisiana, *Gauche vs. London & Lancaster Ins. Co.*, 10 Fed. 349, used these words:

Their meaning is that the assured's right of action shall not be exercised until there has taken place both the delivery of satisfactory proofs and the passage of 60 days thereafter. The assured, therefore, can in no case maintain an action

until 60 days after he has rendered preliminary proofs, which either are to be deemed satisfactory because they are accepted by the insurers, or are satisfactory, whether accepted or rejected by the insurers, because they perform the promise contained in the contract.

There would appear to be no need of multiplying these cases. *Corpus Juris* accepts the question as settled. At page 485, Sec. 220, it says:

A provision that no action shall be commenced until after a certain period from the filing of proofs of loss is valid, and unless waived is a complete defense to an action brought before the expiration of such time.

Bringing a suit prematurely is not a jurisdictional defect, and the courts are pretty consistent in holding that a failure on the part of the defendant to seasonably raise this question will be deemed a waiver. But the serious question aside from this lies in the fact that, according to the weight of authority, the filing of the policy of insurance, and making it a part of the petition, is equivalent to an allegation on the part of the plaintiff that its requirements have been met by the plaintiff. There was no proof offered on the question of the 90-day provision, except the introduction of the policy, which made it incumbent on the plaintiff to refute that provision. A verdict may cure a defectively alleged cause of action, as counsel for plaintiff contends, but it will not cure the allegations of a defective cause of action. *San Francisco vs. Pennie*, 93 Cal. 465. A case not altogether dissimilar to the one under consideration was decided by the Kentucky Court of Appeals in *American Accident Company vs. Carson*, 99 Ky. 441, 34 L. R. A. 301:

An insurance company issued a policy of accident insurance to Carson by which it insured Carson against death and injury resulting from a certain class of accidents, but stipulated that if the death or injury should be caused while Carson was engaged in a more hazardous enterprise or occupation, a lower rate of insurance should be paid. Carson was killed as the result of a gunshot wound. This was not one of the particular class of accidents insured against. In his petition Carson's beneficiary set out the terms of the contract and attached the policy as an exhibit, but failed to state as an affirmative allegation that, although Carson was injured by gunshot, he was not engaged at the time of his injury in a more hazardous occupation. Held, That such an allegation was a material averment of the petition and that without it the court could not render judgment for the full sum to which the policy, on its face, entitled the beneficiary.

The Court said: "The policy was made part of the petition, and forms the basis of the action. The plaintiff must bring himself within its terms and conditions as stated on its very face. It can not be said that this should come from his adversary. * * * Of course, if the true issue is in fact made, it does not matter from whom the exceptional matter comes; and it is true that the company pleaded that the insured was killed while acting as deputy sheriff, and attempted to plead that he was insured as a druggist or dealer, and not otherwise. But just what its pleas would have been, had the plaintiff been required to set up its cause of action according to the terms of the contracts, we do not know; and convinced of this error occurring at the inception of the pleadings, no other question need be considered.

The court has diligently sought for some well-considered authority that would warrant it in refusing to grant a new trial in this action. But so defective are the pleadings which upon the trial was had, in so far as a compliance with the terms of the written agreement may be concerned, and so doubtful is the court with respect to the effect of a failure to allege performance, on the one hand, and a failure to allege nonperformance on the other, there seems to be no escape from what would appear to be an impelling duty to grant a new trial, particularly when this conviction is supported by a further conviction that it was the duty of the court to have sustained defendant's motion for a directed verdict at the conclusion of the plaintiff's testimony, or rather, on its own motion, to have dismissed the action without prejudice, for the reason that it had been prematurely brought. A new trial should never be granted unless it is manifest that some substantial error has occurred during the trial, or some fatal defect exists in some part of the record or proceedings. Another trial under properly joined issues may result as the former trial, but being convinced that an appellate court would reverse this court for the defects here discussed, it must, in the absence of a right of appeal, grant a new trial, but in so doing it is distinctly stipulated that the evidence of the plaintiff at the former trial may be read as his evidence at a rehearing, or the case will be assigned and tried at a time when it will suit his personal convenience to be present, the court having knowledge of the fact that he is now absent from the Isthmus.

FALK *versus* S. S. "OLOCKSON."

(District Court, Canal Zone, Balboa Division, January 5, 1922.)

Civil No. 402.

1. ADMIRALTY. SALVAGE. ALLOWANCE.

Where it appears that the plaintiff salvors performed only one-fourth to one-third of the salvage service and the vessel and cargo salvaged were valued at \$1,078,000, a salvage award of \$15,000 will not be increased under the circumstances of the case.

2. ADMIRALTY. SALVAGE. METHOD OF COMPUTATION.

Because of the large value of vessels and cargoes in modern times, the old-time rule of a large percentage of the value must give way to a standard of allowance analagous to a *quantum meruit* basis.

(NOTE. Aff'd by 5th C. C. A., 281 Fed. 690.)

Proctors for libellant, *Todd and McIntyre*.

Proctor for Government, *A. C. Hindman*, United States District Attorney.

Proctor for claimant of cargo, *C. P. Fairman*.

KERR, District Judge. This cause has been submitted to the court on a motion to increase the allowance of \$15,000 heretofore

made to the libellants. The argument of counsel is based largely on a conviction of error on the part of the court in the amount of the allowance, rather than upon some newly discovered law not considered at the former hearing. The argument in favor of a valuation of \$900,000 for the ship *Olockson*, and \$178,000 for the cargo is urged with increased emphasis and conviction.

If it did not appear in express terms in the former opinion of the court that the award was not based solely on valuation, it may be emphasized in this ruling that the question of valuation was not a deciding factor in the amount of the allowance made, and in now determining the amount that should be allowed, the court must adhere to the principles upon which the original award was made. The amount that libellants seek in this case is larger than any award made by the courts in the history of admiralty in the United States so far as the court is advised. The elaborate memoranda submitted to the court, purporting to give all the substantial allowances made by the courts, there is one unreported case of the *Victory vs. S. S. Delmira*, where an award of 50 per cent was made on a valuation of apparently \$500,000 or \$250,000 to all the salvaging interests. No case is submitted of an allowance of 50 per cent where the amount in controversy exceeded this sum. There are probably not a half dozen contested cases reported where the allowances were appreciably in excess of \$100,000. All of the allowances in the first 50 years of admiralty awards in the courts of the United States would scarcely exceed the sum claimed in this action. All of the awards in the 50 per cent class for the first 100 years, recited in the *Lamington* case (86 Fed. 685), scarcely exceeds \$200,000. This may easily be explained by the fact that neither the cargoes nor the vessels had any such values as the cargoes and vessels of to-day, and when an award of 50 per cent, was made in many instances it amounted to only a trifle in comparison with the danger incurred and the efforts expended. A per cent, basis was, therefore, naturally the basis of awards. Under the present changed conditions, when a vessel may range high in the millions in point of value, and the cargo be of equal value, this basis of computation must yield to one which more nearly partakes of a *quantum meruit*. Counsel have in particular urged upon the court the case of *Alaksen vs. United States*, 273 Federal, Advance Sheets, No. 1, page 241, as opposed to the award made by this court. A careful examination of the facts of that case does not impress the court as it seems to have impressed counsel. The *Ellenorah*, valued at \$900,000, in answer to a wireless, went to the assistance of the *Avondale*, valued at \$2,000,000, including cargo. The *Avondale* was 500 miles from St. Johns, New Foundland, her nearest port. The seas were high, winds strong and weather foggy. Her machinery was disabled,

and she had drifted for several days, in imminent peril. The *Ellenorah* crew was exposed to great hazard and danger for a period of 6 days, during which time the captain slept but very little. Many of the incidents encountered by the crew of the *Gorgona* were present in the salvage of the *Avondale*. The peril encountered was admittedly great, and the seamanship of the crew of the *Ellenorah* heroic and commendable. Both of the ships belonged to the Emergency Fleet Corporation. For the services performed an allowance of \$7,000 was made by the common owner of the two vessels. Of this amount \$1,008.78 was allowed the master of the *Ellenorah*. All of the officers and crew, except the master, accepted this award. Upon a hearing the court increased this sum to \$3,000, and in doing so announced that, had the vessel engaged not have had a common ownership an allowance of \$100,000 would not have been regarded as excessive. This, it will be seen, would have been exactly 5 *per centum* on a valuation of \$2,000,000.

In the case of the *Olockson* and the tug *Gorgona* there was likewise a common ownership, and, to some extent, no doubt, a common engagement of crews. Granting the cargo to have been worth \$178,000 and the vessel to have been worth \$900,000, 5 *per centum* of this amount would be \$53,900. In the rescue of the *Olockson* there were other factors than the crew of the *Gorgona*. All of the work of the tug would have been futile if the fire department had not gone to the rescue. No one of those entitled to claim salvage, makes claim except the crew of the tug. If all entitled to claim, had claimed, the allowance of one-third or one-fourth of the whole to the crew would have been the limit of the allowance they could have received. Certainly if an allowance of \$100,000 had been made in the case of the *Avondale*, \$50,000 could not be said to be grossly inadequate in the salvage of the *Olockson*. As the court recited in the former opinion, all praise is due the crew of the tug. Their conduct merited an award beyond the wages which they received during the time they were engaged in the work of rescue. In the *Avondale* case only \$7,000 was allowed by the owners of the vessel, and this was accepted by all except the master, whose allowance was increased to \$3,000 in recognition of his untiring services covering a period of 6 days, in which he was exposed to danger to himself and in which his ship was likewise exposed to serious hazards. As in the *Avondale* case the court has taken into consideration a common ownership; no money hazard on the part of the crew of the *Gorgona*; a payment of wages during the period of rescue; and the fact that none of the other factors in the rescue are claiming compensation, thereby reducing the proportionate part of the libellants to about one-fourth or one-third of the whole, had all claimed.

The respective amounts to be paid by the cargo and the vessel has been based upon what the court considered a fair division, taking into consideration the payment of over \$2,500 for the use of the tug, and the wages of the seamen and crew while engaged in the work of rescue, which would make the award something over \$18,000, and would entail about the same sum on the cargo owner and the tug owner. The motion to increase will be overruled.

The libellants will receive the amounts, respectively, set out in the memorandum attached hereto, which respective amounts will be copied into and made a part of the judgment of the court.

And the final decree of this court shall make a total award of fifteen thousand dollars (\$15,000) for the libellants, and the master and members of the crew of the tug *Gorgona* interested as salvors, which shall be proportioned among the various parties so interested.

Ex parte DEAL.

(District Court, Canal Zone, Cristobal Division, December 17, 1921.)

Civil No. 384.

1. ALIENS. DEPORTATION.

Where a sailor enters the Canal Zone in violation of the quarantine and immigration regulations, goes to Colon, Republic of Panama, and establishes residence there, and it is shown that he is an undesirable person, he may be arrested in Colon, brought into the Canal Zone, and on due proceedings for deportation be deported.

2. ALIENS. QUARANTINE AND IMMIGRATION REGULATIONS. NOTICE.

Persons coming into the Canal Zone are charged with notice of all regulations with respect to entry into the Zone, and a person who enters the Zone in violation of such regulations may be deported if thereafter found in the Zone.

3. ARREST. LEGALITY.

The court will not inquire into or consider the question as to whether the defendant was kidnapped or illegally arrested in Colon and brought into the Zone. The fact that he is in custody in the Zone gives the court jurisdiction no matter how his presence on the Zone was obtained.

4. HABEAS CORPUS. WRIT OF REVIEW.

Habeas Corpus may not be resorted to for the purpose of freeing a person from detention under an order of deportation where the defendant has been granted a hearing amounting to due process of law culminating in a legal order of deportation. This writ may not be sued as a writ of review to correct errors.

Attorneys for petitioner, *Todd and McIntyre*.

Attorneys for the Government, *A. C. Hindman*, United States District Attorney and *J. J. McGuigan*, Assistant District Attorney:

KERR, District Judge. The applicant, Elmer Frank Deal, is now in custody of the police at Cristobal, and is held on an order of

the quarantine-immigration officer of the Ports of Colon and Cristobal, on the charge of being an undesirable person. That he may be relieved of this detention he has sued out a writ of *habeas corpus* on the ground that he is illegally detained. This contention on the part of the applicant involves not alone the proceedings that have been had, but the power of the quarantine authorities to act in any given case where the facts bear a like relation to the case of Deal. The facts with reference to Deal are not as specifically set forth in any record before the court as might be desired, but it may be asserted as a general proposition that Deal came to the Canal Zone in the capacity of a sailor; that he abandoned his employment as a sailor, and either immediately, or at a time subsequent, took up his residence in the city of Colon. It appeared at the hearing that Deal's wife had returned to the States, and he had assumed illicit relations with some woman in Colon, where he was ostensibly employed as a bartender. His deportation is sought on the grounds that he is an undesirable citizen and his presence on the Zone would work an injury. In addition to this is the charge that he has never passed the quarantine regulations, and being among the class that may be excluded under the quarantine regulations, there now exists in the immigration and quarantine authorities the right to take the same action they would have been authorized to take in the first instance. Counsel for Deal, on the contrary, contends that Deal had placed himself outside of the jurisdiction of the Zone authorities by voluntarily assuming a residence status in the city of Colon, and that his arrest there by American officials was without warrant of law, and that having become a subject of Panama, no rules and regulations of the United States with respect to a violation of the quarantine and health laws were applicable, even had his reentrance into the Canal Zone not have been accomplished illegally.

This question, like all similar proceedings, must be determined by the sole question of jurisdiction. If there exists in the Canal Zone a legally organized tribunal, or agency of government, that had the legal authority to consider and pass upon all regulations that have been established for the government and control of the Canal Zone, particularly with respect to who shall or shall not be admitted therein, or who has or has not complied with the established regulations, and that tribunal has accorded the applicant a hearing, and determined that he should be deported, that is a jurisdictional act, and this court can not grant a writ of *habeas corpus*, unless that tribunal exceeded its authority in so doing.

A hearing before any tribunal established by law, and given jurisdiction in the subject matter of the hearing, has as much legal force as any judgment of court. In 110 U. S. 156, that court held that

“Any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power in furtherance to the general public good, which regards and preserves these principles of liberty and justice” is due process of law. Cited in *Canal Zone vs. Coulson*, 1. C. Z. Rep. 56.

The territory embraced within the limits of what is known and designated as the Canal Zone was acquired by the United States for a definite, distinct purpose. Within that territory, acting within and in conformity to the treaty stipulations between it and the Republic of Panama, it has and may exercise sovereign authority with respect to the government thereof, both civil and political. Such government as has been established must of necessity have been, in the first instance, of legislative origin. The Congress of the United States from time to time has passed such legislation as in its judgment was necessary and essential to the proper control of the territory it had acquired under treaty stipulations, having in mind always the purpose for which the territory in question was obtained. All rules and regulations, therefore, which have been established have been in furtherance of the one primary purpose. All persons, then, who enter the Canal Zone enter it with notice of the regulations which have been established, and in voluntarily assuming a residence within that territory, the person so doing subjects himself to the laws and governing agencies there existing. From the outset it has been the policy of Congress to confer upon the President of the United States an almost unlimited authority in the conduct of the Canal Zone Government. Executive Orders, rather than acts of Congress, have been the rule in the establishment of such regulations as time and experience have made manifest was necessary. These orders, without serious objection, have been acquiesced in since the acquisition by the Government of the Zone territory. Necessarily the detail of execution had, in turn, to be delegated by the President to the Governor, or the executive head, and by him to such agencies of government as had been established either by law or Executive Order. In conformity, therefore, with this established custom, the President on the 6th day of February, 1917, issued this order:

The Governor of the The Panama Canal is hereby empowered to exclude or to cause to be excluded the following classes of persons from the Canal Zone: Idiots, imbeciles, feeble-minded persons, the insane, persons who have been insane within 5 years previous to their attempted entry into the Canal Zone, epileptics, paupers, criminals, professional beggars, gypsies, persons of notoriously bad character, persons whose presence would be a menace to the public health or welfare of the Canal Zone, or who would be liable to become a public charge, or who may be suffering from a loathsome or dangerous contagious disease, those who have been convicted of felony, anarchists, those whose purpose it is to incite insurrection, and others whose presence, in the judgment of the governor, would tend to create public dis-

order or in any manner impede the prosecution of the work of opening the Canal or its maintenance, operation, sanitation, and protection; and the governor may expel from the Canal Zone, and deport therefrom, any person convicted of a criminal offense of the grade of felony, or whose presence, in the judgment of the governor, would tend to create public disorder or in any manner impede the prosecution of the work of opening the Canal or its maintenance, operation, sanitation, or protection.

By Section 11 of this order the Governor of the Canal Zone was authorized to make such rules and regulations as might be necessary to carry out this order. Accordingly on the 25th day of April, 1917, the governor issued an order placing the execution of the provisions of the President's Order under the control of the Quarantine Division of the Zone. By this process, beginning with the act of Congress, placing authority in the hands of the President, and by the President placing authority in the hands of the Governor, and by the Governor placing authority in the hands of the Quarantine Division, there was established a tribunal that had authority to enforce the provisions of the Executive Order of February 6, 1917. When Deal abandoned his employment and remained on the Isthmus, whether in Panama or the Zone, he must of necessity have first subjected himself to the quarantine regulations then in force. If he escaped those requirements, and became a resident of Colon, he did not thereby acquire a right of exemption from those requirements once he subsequently entered the territory of the Zone. It is the argument of counsel that he was "kidnapped" in effect and brought back to the Zone against his will and without his consent. Assuming this to be true, though it is a mere assumption, he is now within the Zone, and may be tried for any previous violation of its rules and regulations. He may not have been legally arrested, the act of the arresting officer in making the arrest may subject him to criticism, the practice may be a reprehensible one, admitting the contention made by the applicant, but in the absence of an objection on the part of the officials of Panama, the method of procuring Deal's presence on the Zone does not affect the jurisdiction of the tribunal authorized to deal with any infraction of the laws over which it has the power of enforcement. This identical question has been decided by the Supreme Court of the United States in the case of *Cook vs. Hart*, 186 U. S. 190. The prisoner had been actually kidnapped in Peru and carried to Illinois. The opinion in this action recites and comments upon all the authorities, and settles conclusively that the method of acquiring jurisdiction is not a matter to be inquired into on a writ of *habeas corpus*. Accepting this as settled law the applicant is in the same legal status that he would have occupied in the first instance. The argument of counsel, therefore, with regard to the manner in which Deal came into the Zone may be discarded. The only remaining question left for the consideration of the court being the legality of the tribunal having control over the offenses with which Deal is charged.

In determining the legal status of citizens of the United States resident upon or within the jurisdiction of the Canal Zone, the relation which the territory over which the United States exercises sovereignty bears to the general government must be taken into consideration. Citizenship, as that term is commonly understood, can not be acquired in the Canal Zone. The right to acquire and hold land is denied. No one may become a resident on the Zone without permission, so far as employment is concerned. The Government of the United States exercises much the same control over the territory it has acquired, and over those that enter thereon, that any landlord might exercise over his tenants. Just as a landlord may establish rules and regulations for the conduct of his business, so may the United States establish rules and regulations for the government and control of the business in which it is engaged, and just as a landlord may delegate the execution of such rules and requirements as he may establish, so, on principle, may the United States delegate the execution of its regulations to any agent or agency it may establish for that purpose, just as any public enterprise, privately owned, might do. The contention that delegated and redelegated authority is illegal must not leave out of consideration the nature of its application and the relationship of the parties. There are times when the maxim "*Delegatus non potest delegare*" must yield to the equally potent maxim that "*Facit per alium facit per se.*"

The deprivation of one's liberty without due process of law is one that ought always to receive the very closest attention of the tribunal before which such contention is made. The phrase "personal liberty" is a much misunderstood and much abused term. Government necessarily implies restraint. Citizenship carries with it a recognition of a supreme governing power. Those who compose a political entity submit themselves to such laws and regulations as the delegated instrumentalities of government may enact for the public good. Every law so enacted operated as a restraint. Legislative enactments would lose their significance if it were not a recognized principle of government that the end and object of all laws is to render the greatest good to the greatest number. Laws unenforced are laws in name only. Society depends on law enforcement for its perpetuity. And fortunately for society the courts have always recognized the right of the lawmaking bodies to create laws for the moral as well as the physical well-being of its members. There could be no such thing as social purity if this were not true. An uncontaminated social order can not exist if the political body be corrupt, and equally true is the reverse. The territory of the Canal Zone is far removed from the seat of government. Its is a delegated rather than a sovereign government. The rules and regulations that have been established

for its government relate to the welfare of those who dwell within its boundaries, and solely for them, and it may determine for itself what class of persons it deems desirable and what class undesirable. Among the requisites which time and experience have established as expedient for the welfare of its inhabitants is a rigid sanitary system, rigidly enforced. Both the spirit and the letter of the law includes within this requirement a healthy moral as well as a healthy physical condition. The provision of the law which permits the exclusion of a leper permits the exclusion of persons of notoriously bad character, afflicted with a loathsome disease, or whose presence would be a menace to the public health. If a physical leper may be excluded may not also a moral leper be excluded? Is it any more a denial of due process to confine a leper on a lonely isle or other segregated place than it is to deport a moral leper from the confines of a territory where his presence would be a menace? What in wisdom has been decreed as beneficial, the courts must enforce, so long as no fundamental right is invaded.

In the opinion of the court the quarantine board, or whatever may be its technical designation, had authority in the first instance to expel the applicant, if he came within any of the inhibitions prescribed. If it had authority in the first instance it has it now. The accused is entitled to a hearing. Of this, no agency of government, or even the Government itself, could deprive him. And such hearing, once had, no matter how much its findings may be the subject of criticism, if it acted within its jurisdiction, its action is final, so far as relief by *habeas corpus* is concerned.

Let the writ be refused.

MCCONAUGHEY *versus* MORROW, *et al.*

(District Court, Canal Zone, Balboa Division, January 5, 1922.)

Civil No. 540.

1. CANAL ZONE. FORM OF GOVERNMENT.

The Canal Zone Government is statutory and not constitutional, and the provisions of the Constitution as a rule does not apply thereto.

2. INJUNCTION. EXECUTIVE.

The courts will not restrain the executive from exercising powers given by the organic law which involve the exercise of discretion and judgment.

3. OFFICERS. MINISTERIAL DUTY DEFINED.

A ministerial duty is one which has been positively imposed by law and its performance required at the time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion. An act is ministerial where the law describes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.

4. OFFICERS. DISCRETIONARY AND JUDICIAL DUTY DEFINED.

Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it shall be performed. When a positive duty is enjoined and there is but one way in which it can be performed lawfully then there is no discretion reposed in the officer, but where it may be performed in more than one way, leaving it to the judgment of the officer to determine the way in which it shall be performed, then the duty is discretionary or judicial.

5. PANAMA CANAL. EMPLOYEES. VESTED RIGHTS.

Under the regulations adopted by the Isthmian Canal Commission, providing that free quarters and sundry other privileges would be furnished Panama Canal employees, and with due consideration of all subsequent regulations and Executive Orders with relation thereto, it is held that employees were granted free quarters and other privileges as revocable privileges only, and that they acquired no vested right thereto.

6. PANAMA CANAL. EMPLOYEES. REGULATIONS CONCERNING PRIVILEGES. PANAMA CANAL ACT.

Section 2 of The Panama Canal Act, declaring valid and binding until Congress shall otherwise provide all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal, did not validate nor give the force of law to regulations granting to employees of The Panama Canal revocable privileges such as free quarters, light, water, etc.

7. INJUNCTION. EXECUTIVE. HEADS OF DEPARTMENTS UNDER EXECUTIVE.

The defendants in this case are the mere agents of the President in carrying out an Executive Order promulgated by the President, and these defendants are no more subject to the control of the courts than the President himself. An injunction does not lie to restrain the President in the making or carrying out of the Executive Order of December 3, 1921.

(NOTE. Aff'd 5th C. C. A., 279 Fed. 617 and U. S. Sup. Ct., 263 U. S. 39.)

Attorneys for plaintiff, *Todd and McIntyre*.

For defendants, *A. C. Hindman*, United States District Attorney.

KERR, District Judge. The plaintiff, on behalf of himself and all others similarly situated, has filed an action against J. J. Morrow, Governor of the Canal Zone; H. A. A. Smith, Auditor, and R. W. Glaw, Paymaster, seeking to enjoin them from deducting any portion of their pay as employees of The Panama Canal or the Panama Railroad, for rentals and other charges, fixed by the Canal Zone authorities, pursuant to an order of the President of the United States, in an Executive Order of the President bearing date of the 3d of December, 1921, which order is in the words and figures following:

By virtue of the authority vested in me it is hereby ordered: 1. Pursuant to the provisions contained in paragraph 17 of the Executive Order of February 2, 1914, fixing conditions of employment governing employees of The Panama Canal and Panama Railroad on the Isthmus of Panama, a charge will be made for rent, fuel, electric current, water, and services in connection with quarters, on and after January 1, 1922.

RENT.

2. The rental will be based on the present average depreciated value of the area occupied by the tenant, to be determined by the Governor of The Panama Canal. The rental will be sufficient to amortize the investment in quarters on the basis of a total average life of 36 years, to return five (5) per cent for amortization and interest on the investment, and in addition cover the amount fixed for expenditure for repairs due to ordinary wear and tear of building and for the disposal of garbage and other services necessary from a sanitary point of view. The rental for bachelor quarters and for nonhousekeeping quarters may be fixed to include all miscellaneous services which are rendered. The rental of buildings hereafter erected shall be fixed so as to conform with rentals theretofore charged for similar buildings.

3. Charges for fuel, electric current and water, will be based upon cost; where meters are not installed, the charge for water will be based upon average consumption, and the charge for current upon the number of lamps or other devices installed.

4. Miscellaneous work, such as repainting interior of houses, repairing electric fixtures, breakage in screens, furniture and stoves, plumbing, etc., and the cutting of grass and trimming of hedges around quarters, will be done upon request of tenants and charges for such services will be made on basis of cost. Any repairs made necessary by reason of a tenant's misuse of the premises or any property therein, will be made by The Panama Canal and the cost therefor collected from such tenant.

5. The Governor of the Panama Canal is charged with the duty of issuing such instructions as may be necessary to carry out this order and to fix charges as herein outlined, subject to the general instructions provided.

(Sgd.)

WARREN G. HARDING.

The defendants have moved to dismiss the action for the following reasons:

1. That this court is without jurisdiction of the subject matter of the said bill, in that it appears from said bill that it is a suit to enjoin the collection of funds for and on behalf of the United States and for deposit in the Treasury of the United States, and is, therefore, in effect a suit against the United States.

2. That this court is without jurisdiction of the subject matter of the said bill and of the persons of these defendants, for the reason that it appears from said bill that said defendants are officials of the Executive Branch of the Government of the United States, and in the matters complained of in said bill are acting in their respective official capacities by and under the direction of the President of the United States. That this court has no jurisdiction to enjoin the President of the United States, or any other person carrying out his orders in their official capacities.

3. That the Executive Branch of the United States Government and the Judicial Branch of the United States Government are coordinate branches, and there is no jurisdiction in this court to enjoin a coordinate branch of the United States Government in the exercise of its executive discretion.

The purpose for which a statute is enacted will frequently aid in determining its true import and meaning. The Canal Zone Government is the result of a series of Congressional enactments, supplemented, from time to time, by sundry Executive Orders, promulgated pursuant to powers conferred on the President by the acts themselves.

The Canal Zone, as it is commonly designated, was acquired by the Government of the United States for a predetermined purpose. The acts of Congress and the Executive Orders issued pursuant to

the powers conferred in such acts, are in aid of that purpose. All rules and regulations that have been established by Legislative or Executive enactment bear an immediate relationship to that purpose. From the outset both the Legislative and Executive branches of government have been involved. As to them it has been a coordinated undertaking, each acting in harmony with the other. Congress has exercised little or no supervisory power, preferring rather to confer that power upon the Executive. In consequence such rules and regulations as have been enacted and established from time to time for the construction, operation and maintenance of what is known as The Panama Canal have been promulgated by the Executive, acting under direct authority from the Legislative. The first act of Congress, approved June 28, 1902, authorized the President to acquire from the New Panama Canal Company, of France, all of its rights, franchises, property, real and personal, its stock in the Panama Railroad, and everything of value which it possessed, for the stipulated sum of forty millions of dollars, and to acquire such additional territory as Congress directed, for the definite purpose of constructing an Isthmian waterway from the Caribbean Sea to the Pacific Ocean, and such additional territory as might in his judgment be necessary for the purposes intended. By this same act there was created an Isthmian Canal Commission for the sole purpose of enabling the President to construct such canal and the words appurtenant thereto, the supervisory power of the President over that Commission being provided in the following language:

Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the President annually, and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings. * * *

Section 2, of the Act of April 28, 1904, makes this further provision with reference to the powers of the President:

That until the expiration of the Fifty-Eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

Approved, April 28, 1904. (33 U. S. Stats., 429.)

The Act of August 24, 1912, commonly designated as the "Panama Canal Act," confers additional powers upon the President, in addition to confirming his previous acts. Section 2 of that act provides as follows:

That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the

Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. * * *

In anticipation of the early completion of the undertaking, and in consequence thereof the abolition of the Isthmian Canal Commission, even greater powers were conferred upon the President at the conclusion of the functions of that Commission. Section 4 of that act makes the following provision with reference thereto:

That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive Order to discontinue the Isthmian Canal Commission which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed and operated, through a governor of The Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. * * *

Section 7 defines the powers and duties of the governor as follows:

That the Governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the Governor of The Panama Canal, who shall perform all such executive and administrative duties required by existing laws. * * *

A careful examination of this act discloses the fact that while Congress reserves the right to modify existing rules and regulations, or to create new ones, there is nevertheless conferred upon the President, in reality, the entire management and control of the operation and government of the Canal and the Canal Zone, and all subsidiary agencies.

These various acts have been alluded to and quoted from for the purpose of indicating the extent to which Congress has gone, from the first inception of this undertaking, in conferring upon the President not only unlimited control but unlimited discretion in all matters of construction, maintenance, operation and government. Therefore, as incident to and as the coefficients of these powers, the further right to establish all rules and regulations that may be deemed necessary to effectuate the purpose intended by these grants of power, follows as a natural consequence.

From the foregoing recitals it will be seen that Congress, having by appropriate legislation authorized the building of the Panama Canal, and made all necessary appropriations therefor, in effect created the President of the United States an attorney in fact to supervise and control the actual work of construction. This power was not

granted to Theodore Roosevelt, or William H. Taft, or Woodrow Wilson, or Warren G. Harding, but to the President of the United States, thus delegating to the Executive, in addition to the Constitutional powers which he possessed, an unlimited statutory power. Out of this anomaly has arisen the question which is now presented to the court. It will not be argued that Congress can create an instrumentality of government and confer upon that instrumentality powers of legislation which have been exclusively delegated to it by the Constitution. Neither can it delegate such powers to any department of government already in existence. When the power to create and the power to execute are both lodged in the same functionary independent sovereignty ceases to exist. If, therefore, Congress actually, or even constructively, conferred upon the Executive, in any of the above-recited acts, these powers of legislation which belonged exclusively to it, to the extent of such delegation it was an unconstitutional act, and, therefore, inoperative. Clearly the powers exercised by the President in constructing, and therefore in operating, the canal were statutory rather than Constitutional. This being true these powers which are purely political, and which are derived from the Constitution, as a rule, will be eliminated from this consideration. The courts are practically unanimous in holding that a court of equity can not restrain an executive from exercising that authority which is derived from the organic law, neither can they compel him to act if he refuse. The status of the President, and the nature of the authority delegated to him, and under which he has acted, must be determined from contemporaneous construction and from the language of the acts themselves. The power to treat with an independent government for the territory embraced in the Zone, and to contract for the building of a canal there across, was not a Constitutional power possessed by the President. Congress had the power to create any individual its attorney in fact. In conferring that power upon the President, however, there has been created a perplexity of status that does not seem to have hitherto arisen. Was it the intention of Congress that the President should act in his individual or in his executive capacity in the exercise of these powers which it conferred? Upon a determination of this question the jurisdiction of the court may, in part, depend.

In determining its jurisdiction the court may give consideration to what it regards as the three most important features involved. Briefly stated they are:

1. Do the acts of Congress prescribe the performance of mere ministerial duties by the President, or do they confer upon him powers involving his individual judgment and discretion?
2. Have the complainants acquired such legal rights in the subject matter involved that they may maintain an action in equity to restrain any interference therewith?

3. Is this an action against the President of the United States? If so, has this court jurisdiction to command or restrain him?

These propositions will be considered in the order stated.

The first proposition involves a consideration of those acts which are purely ministerial and those involving the exercise of judgment and discretion. What are ministerial and what are judicial acts have been variously defined. "The most important criterion, perhaps, is that the duty is one which has been positively imposed by law, and its performance required at a time and in a manner or upon conditions, which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." Mechem, Pub. Off., Sec. 657. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to judicial discretion. It is a simply definite duty arising under conditions admitted or proved to exist, and imposed by law." *Mississippi vs. Johnson*, 4 Wall. 475. "Where the law describes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial." *Gen. Land Office vs. Smith*, 5 Texas 471. "Discretion in the manner of the performance of an act arises when an act may be performed in one of two or more ways either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But, when a positive duty is enjoined, and there is but one way in which it can be performed lawfully, then there is no discretion." *State vs. Brooks*, 6 L. R. A. (N. S.) 762. "A ministerial duty is one in respect to which nothing is left to discretion." *Sullivan vs. Shanklin*, 63 Cal. 247, 251. Numerous definitions might be cited, but they would all be to the same import. From these and such additional definitions as might be quoted, a few simple propositions may be stated, concerning which there can be no argument: (a) A mandatory writ will lie to compel the performance of an act which the law specifically enjoins; (b) unless the act so enjoined by law be ministerial the writ will not lie; (c) a writ will not lie to compel or prevent the performance of a judicial or discretionary act; (d) where an act is specifically enjoined by law, but the manner of performing it is discretionary, or involves judicial action, a writ will lie to compel performance, but will not lie to compel performance in a particular manner.

Following these definitions and the rules deduced therefrom it becomes important to determine whether the acts of Congress conferred upon the President mere ministerial duties, or whether they conferred upon him duties involving the exercise of judgment and

discretion. If the former, as an individual, separated from the office of executive, has he failed to perform these duties, or is he about to perform them in an illegal way? If so, the question of injunction sought by the complainants may be considered; if not, they are without the jurisdiction of a court of equity. For a determination of the character of these duties thus imposed, we may look not alone to the language of the acts, but to the interpretation placed thereon by the President, and the acquiescence in that interpretation by Congress. It will be seen from the excerpts above made that the several acts contain such expressions as "all rules and regulations necessary for the government of the Canal Zone * * * shall be exercised in such manner as the President shall direct," Sec. 2, Act of April 28, 1904; "when in the judgment of the President the construction of the Canal shall be sufficiently advanced * * * the President is authorized thereafter to complete, govern, and operate * * *" Act of August 24, 1912. Throughout, the several acts of Congress abound with similar expressions. Words lose their import and interpretation becomes a whim of the fancy if this language could be so construed it would imply the imposition of a duty to do a certain thing in a certain way, without recourse to either judgment or discretion. Nor has it been so construed by any of the Presidents. In a letter addressed to William H. Taft, then Secretary of War, dated May 9, 1904, President Roosevelt interpreted the act of Congress as authorizing him to "excavate, construct, and complete a ship canal from the Caribbean Sea to the Pacific Ocean," and "to make all needful rules and regulations for the government of the Canal Zone, and all the rights, powers and authority granted by the Canal Convention to the United States, until the close of the Fifty-Eighth Congress." Each of the four Presidents have in turn adopted the phrase "By virtue of the authority vested in me by law" as a prefatory introduction to each order issued by him, thus clearly indicating an interpretative version with an unlimited discretion. If, then, Congress did confer upon the President the doing of a thing that involved personal judgment and discretion can a court of equity interpose? Among the authorities there is little or no conflict. Only a few of the leading cases may be noticed.

In *Decatur vs. Paulding*, 14 Pet. 497, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

In the case of *People, etc. vs. Sutherland*, 18 Am. Rep. 90, Judge Cooley has discussed this subject in a way that leaves no room for doubt. Only a few extracts therefrom will be necessary to indicate its application to the present hearing:

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and, within their respective spheres of action, equally independent. One make the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties."

Another case in point is that of *Louisiana vs. McAdoo*, 234 U. S. 629:

There is a class of cases which hold that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if

the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. *Marbury vs. Madison*, 1 Cranch, 137, 2 L. Ed. 60; *Kendall vs. U. S.*, 12 Pet. 524, 610, 9 L. Ed. 1181, 1215; *U. S. vs. Schurz*, 102 U. S. 378, 26 L. Ed. 167, are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are *Decatur vs. Paulding*, 14 Pet. 497, 514, *et seq.*, 10 L. Ed. 559, 567; *Mississippi vs. Johnson*, 4 Wall. 475, 18 L. Ed. 437; *Cunningham vs. Macon & B. R. Co.*, 109 U. S. 446, 27 L. Ed. 992, 3 Sup. Ct. Rep. 292, 609; *U. S. ex rel. Dunlap vs. Black*, 128 U. S. 40, 32 L. Ed. 354, 9 Sup. Ct. Rep. 12; *U. S. ex rel. International Contracting Co. vs. Lamont*, 155 U. S. 303, 39 L. Ed. 160; 15 Sup. Ct. Rep. 97; *Roberts vs. U. S.*, 176 U. S. 221, 41 L. Ed. 443, 20 Sup. Ct. Rep. 376; *U. S. ex rel. Riverside Oil Co. vs. Hitchcock*, 190 U. S. 316; 47 L. Ed. 1074, 23 Sup. Ct. Rep. 698; *U. S. ex rel. Ness vs. Fisher*, 223 U. S. 683, 56 L. Ed. 610, 32 Sup. Ct. Rep. 356.

Likewise the case of *Decatur vs. Paulding*, 14 Pet. 497, involving the interpretation of a resolution of Congress:

The duty required by the resolution was to be performed by him as the head of one of the executive departments of the Government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. * * * If a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. * * * The interference of the courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.

Authorities to the same effect could be multiplied to an unlimited extent, but without here making further recital it may be said that only in those instances where a plain ministerial duty has been prescribed may its performance be enforced, or action under it enjoined by a court of equity, unless the act creating the duty itself be unconstitutional, a phase of the subject that will be hereafter noticed. It is manifest, therefore, that unless there exist some violation of the authority conferred neither this nor any other court would have jurisdiction to grant the relief sought.

There is no rule of law better established than that which requires the complainant in an action seeking injunctive relief to have a property interest in the subject matter of the action. It is alleged by the complainants that as an inducement to them to enter into the services of The Panama Canal and its accessories there was held out to them by the President, the Isthmian Canal Commission, and the Governor of the Canal Zone the inducement that they would be furnished free quarters, free light, free water, and sundry other privileges in addition to the emoluments which they would receive for their services; that these inducements were a part of the consideration which they were to be paid and but therefore they would not have entered into the employment thereof, and that by virtue of the contractual relations thus established between them and the United States they have acquired a property right in the use and occupation of the quarters which they occupy and to which they were assigned that can not now be taken from them, except through the impairment of an existing contract. In this connection it will be necessary to notice such documentary history as the court has been able to discover bearing upon the question of free rentals and other privileges incident thereto.

Act No. 8 of the Executive Branch of the Canal Zone Government, bearing date September 2, 1904, contains this provision:

By authority of the President of the United States, be it enacted by the Isthmian Canal Commission: * * *

Sec. 53. The employees in the service of the Government of the Canal Zone stationed on the Isthmus whose salaries are \$1,000 or more per year shall be entitled to quarters, or in lieu thereof in each case to a sum equal to 8 per cent of the annual salary, at the option of the Commission. * * *

So far as the court is advised this is the first reference made to the subject of free rentals. On the 2d day of February, 1914, Executive Order No. 1888 was issued by President Wilson, and that order contains this provision:

By virtue of the authority vested in me by law, it is hereby ordered that the general conditions of employment governing employees on the Isthmus of Panama, necessary for the completion, care, management, maintenance, sanitation, government and operation of the Panama Canal, the Canal Zone, the Panama Railroad, and other adjuncts, shall be as follows:

17. Where practicable, such bachelor quarters on the Isthmus as may be available from time to time will be assigned all employees desiring them. Family quarters, when available, will be assigned under such rules as may be prescribed by the governor. A charge will be made for rent, fuel, and electric current at such time, and accordance with such regulations as the President may hereafter establish.

On the 15th day of January, 1915, President Wilson issued Executive Order No. 2120, which order contains this provision:

By virtue of the authority vested in me it is hereby ordered: * * *

8. The free use of quarters, free fuel and free electric current are not, under the conditions of employment now governing, a vested or contract right of employees,

but revocable privileges, which it has been considered advisable to continue until the permanent force was organized. The revocation of these privileges shall not be made the basis for increasing salaries or wages or otherwise increasing compensation.

On the 25th day of May, 1915, Executive Order No. 2204, was published by the President:

By virtue of the authority vested in me, it is hereby ordered that the Executive Order of January 15th, 1915, relative to charges for rent, fuel and electric current furnished employees of the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, is modified by suspending from the operation thereof so much as relates to rent, fuel, and lights during the period of actual construction of the Panama Canal, but not later than June 30, 1916.

These several orders, read in connection with the allegations of the petition asserting a property right in the privilege of free rentals, free fuel, and free lights, leave a gap that has not been filled. In view of the fact that the President, as far back as February 2, 1914, announced that a charge would be made covering these privileges hitherto allowed in accordance with such regulations as the President might thereafter establish; and in view of the further fact that the President on the 15th day of January, 1915, did issue an order withdrawing these privileges, and in so doing explicitly stated they were not "vested or contract rights of employees, but revocable privileges;" and in view of the yet further fact that on May 25, 1915, the President in restoring these privileges expressly stated that they would be continued only during the period of actual construction, and in no event later than June 30, 1916, upon what act of any one of the Presidents is based the allegation of a contractual relationship with respect to these privileges? For a period of almost 8 years there has been an outstanding notice from the President that there existed the right to withdraw these privileges, and that no vested or contract rights had been or could be acquired therein. In view of these facts how did, or how could the employees of the United States acquire a vested or property right of any kind in these privileges? On the contrary did they not accept employment with notice that they could not acquire such privileges? It is urged that the Act of the Isthmian Commission, bearing date of September 2, 1904, Sec. 53, above quoted, conferred the privilege in the first instance, and the rights now asserted were acquired by virtue of that act. Is this position tenable? The order of President Roosevelt calling the Isthmian Canal Commission into being, expressly provides that every act passed by that Commission shall be preceded by the caption "By authority of the President of the United States," it being the purpose and intention of the President not to grant to this or any other auxiliary, power over which he might not exercise supervision. Manifestly, then, the acts of the commission, from the outset, were the acts of the President, and when the

commission ceased to exist the President was left in the same position as if there had never been a commission. That it was the intention of Congress to hold the commission in subservience to the President is clearly indicated by the language of the act creating it, which provides that "said commission shall in all matters be subject to the direction and control of the President." It is contended, however, that the Panama Canal Act Sec. 2, heretofore quoted, ratifies the act of the commission in establishing free rentals, and that the President is powerless to revoke that privilege without authority from Congress. The language of the act is "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide." It will be observed this ratification is limited to such rules, regulations, etc., as had been promulgated for the "government, sanitation, and construction" of the Panama Canal. Did this include the privilege of free quarters? If so, it included also every rule and regulation promulgated and established by either the commission or the President during the construction period. If the privilege of rent was included the established scale of wages and many other similar rules then existing were also included. If it were a question vital to this issue it might be urged with force and reason that many of the acts of the Canal Commission were clearly unconstitutional. That Congress could not delegate to a commission appointed by the President the right to legislate with reference to the life, liberty and property of citizens of the United States in matters where Congress alone could act, will hardly be questioned, and when the Canal Commission undertook, even with the sanction and authority of the President, to establish a code of laws that involved the life and property of the citizen, it went beyond its jurisdiction, and to cure this evident exercise of a power it did not possess and that could not be delegated to it, Congress found it necessary to ratify the laws the commission had established until such time as Congress might otherwise decree. But certainly Congress did not intend to give statutory sanction to every rule and regulation established by the commission and the President during the construction period of the Canal, and to hold such rules and regulations binding after construction. The sanitation regulations, port regulations, tariff schedules, transportation rates have been made the subject of constant change. This could not have been done if every rule and regulation prior to 1912 received the statutory sanction of Congress in the ratification clause of the Panama Canal Act, and were now binding. It can not be said that the ratification act applies to one rule or regulation and does not apply with equal force to all the

others. The Attorney General on June 19, 1916, in construing the term "compensation" with relation to the privileges enjoyed by the employees of the Canal impliedly concurred with the conclusion reached by the President in the Executive Order of January 15, 1915, in holding that rental and other privileges were revocable at the will of the President. Since, then, the power to enact carries with it the power to repeal has the President exceeded his authority in withdrawing a privilege declared by his predecessor to be revocable? Has not Congress by its silence acquiesced in the acts of a former President, and in the construction placed by him on his powers of revocation? In this connection the opinion of Attorney General Bonaparte, dated January 30, 1907, 26 Op. 119, may be considered as bearing upon the conclusions reached by President Wilson. Some doubt had arisen in the mind of the Secretary of War with reference to the rights of the President upon failure of the Fifty-Eighth Congress to enact additional legislation for the government and control of the Canal Zone. In response to an inquiry from the Secretary of War the Attorney General said: "In my opinion the President may now, directly or through the persons appointed and employed by him to govern the Zone and build the Canal, adopt needed rules and regulations for the government of the Canal Zone, and that he has not lost the power to modify any of the rules and regulations established by the Canal Commission prior to the expiration of the Fifty-Eighth Congress. And again in this same communication the Attorney General says: "There is nothing in this act, approved April 28, 1904, or in any other act of Congress relating to this subject matter, which discloses any purpose on the part of Congress to give to determinations of the Isthmian Canal Commission a peculiar permanency, or to exempt them from modification or rescission in the discretion of the President." That the act of 1912 did not take from the President the power to rescind existing privileges concerning rents has clearly been the opinion of the several Presidents since the passage of that act. If President Wilson had thought he possessed no power of regulation or rescission, it is not conceivable that he would have said in the order of May 25, 1915, rescinding the order directing the collection of rents, that the rescission should in no event be operative beyond June 30, 1916. Reverting to the fact that to assume that it was the purpose and intention of Congress in the Act of 1912 to withdraw from the President any control over the subject of rentals, and other privileges, is to assume that it was equally the purpose and intention of Congress to withdraw from the President control over any of the existing laws and regulations of the Isthmian Canal Commission at the time of the passage of the act in question. Clearly Congress had no such intention, nor has any of the Presidents ever attributed any such intention

to Congress. If, then, Congress did not withdraw the power of revision from the President the order of President Harding is otherwise legal, and the complainants have not now and have never had an irrevocable interest in these privileges. That they have no right of action, if this be true, will not be disputed. Rose, in his notes on the case *Marbury vs. Madison*, concludes, after a review of the cases, that two things must concur: "First, a clear, legal right to have the thing done, to compel the doing of the thing for which the writ is sought; and, second, that there is no other adequate legal remedy by which the specific performance of the duty can be enforced." High on Extraordinary Legal Remedies, Sec. 431, lends added strength to the rule. A collection of the leading authorities in support of this proposition will be found in the text of the above authors as indicated.

The court having advanced thus far in its considerations and conclusions only a brief discussion of the third proposition will be necessary. This is an action against the Governor, the Auditor and the Paymaster of the Canal Zone. The governor is an appointee of the President, and the other two are appointees of the governor. The act complained of is based on an order issued by the President of the United States to the Governor of the Canal Zone. The defendants are merely the agents of the President for the enforcement of his orders. They have no interest personal to themselves in the controversy, except as they may incidentally be subject to the operation of the order itself. "When the head of a department acts as a mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the Chief Executive himself." *People vs. Governor*, 18 Am. Rep. 95. As heretofore expressed, the powers asserted by the President are derived from an act of Congress and not from the Constitution. The delegation of power is to the office of President and not to the individual. It is to be assumed that Congress acted under the assumption that one selected by the people to hold the highest office created by the Constitution would be competent to discharge the duties imposed in its acts with reference to the construction and operation of the Canal. Whether Congress considered the effect of a delegation of power to the office rather than the individual may be doubted, but that there is a marked difference may not be doubted. The significance of such a discrimination is clearly set forth by Judge Cooley in the last mentioned case, when he says:

The apportionment of power, authority and duty to the governor, is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purpose of their juris-

diction, the courts may treat is precisely as if an inferior officer has been required to perform it. To do this would not only be to question the wisdom of the Constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of cooperation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government.

Another case bearing upon this phase of the subject is that of *Wilson vs. Louisiana Purchase Commission*, 133 Iowa 568. In this action the plaintiff claimed that there was due him the sum of \$200 under a contract with this commission. This commission was formed by an act of the legislature. Among the duties delegated to it was the auditing and passing upon the validity of claims presented for payment, which claims, when allowed, were to be paid by the State. Plaintiff alleged the performance of certain services, and the refusal of the commission to allow his claim. Among other defenses it was claimed this was in effect an action against the State, the commission being its delegated agent. In discussing the subject the Court said:

The Louisiana Purchase Exposition Commission was a creature of the State, created for the specific purpose of representing the State and its interests at the exposition bearing its name. All expenses incurred by it in the execution of its delegated powers were payable from the funds of the State set apart by legislative authority for that express purpose. The commission was clearly but an agent of the State through whom the public funds were to be disbursed, and this disbursement was authorized by law only upon the exercise of the discretion and judgment of the commission. While the State is not named as a party in the action, it is quite clear to us that it is in fact the actual party in interest. If the writ prayed for were to be issued, it would compel the defendant to make a draft upon State funds; in other words, the effect thereof would be to compel the State itself to pay the plaintiff's claim, which is an unliquidated demand for which no specific provision has been made from State funds. It is fundamental that a State can not be sued in its own courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the State to enforce satisfaction for claims.

In the recent case of *Louisiana vs. William Gibbs McAdoo*, Secretary of the Treasury, of the United States, 234 U. S. 629, there is a strong reaffirmation of this same doctrine:

That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as party on the record, but by the effect of the judgment or decree which can here be rendered. *Minnesota vs. Hitchcock*, 185 U. S. 373, 387, 46 L. Ed. 954, 962, 22 Sup. Ct. Rep. 650; *Kansas vs. United States*, 204 U. S. 331, 333, 51 L. Ed. 510, 27 Sup. Ct. Rep. 388.

Under the allegations of the petition the immunity claimed by the plaintiffs grows out of an implied contract on the part of the United States, made through the President, with the employees of the Govern-

ment of the Canal Zone. Without authority, it is claimed, the President has issued an order which impairs the rights acquired under that implied contract. If this court adheres to the rulings announced in the foregoing cases, it must conclude that this is an action against the President of the United States, or the United States, or both. The defendants named are only nominal parties, and not the real parties in interest. Reverting again to the *McAdoo* case we find the law thus clearly stated by Judge Lurton:

No principle is better established than that the United States may not be sued in the courts of this country without its consent. If, therefore, this be a suit against the United States, the State, though entitled as a State to appeal to the original jurisdiction of this court, must show some authority from Congress under which such a suit may be brought, or leave to file must be denied. *U. S. vs. Clarke*, 8 Pet. 436, 8 L. Ed. 1001; *U. S. vs. Lee*, 106 U. S. 196, 27 L. Ed. 171, 1 Sup. Ct. Rep. 240; *Kansas vs. U. S.*, 204 U. S. 331, 333, 51 L. Ed. 510, 27 Sup. Ct. Rep. 388.

This case follows the earlier case of *Beers vs. Arkansas*, 20 How. 993, 15 L. Ed.:

It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents so be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

A multiplication of authorities upon this subject is not regarded as essential. Something may be said in answer to the argument of counsel for complainants, and some notice may be taken of a few of the authorities upon which reliance is placed. It is claimed that the President is acting in excess of authority, and therefore an action will lie to restrain him from so doing, the fact that he is President being immaterial. Under the conclusions reached by the court this would be true if he were acting under an unconstitutional statute. The case of *Hoover vs. McChesney* has been urged with confidence by counsel in support of his contention. An examination of the *Hoover* case will disclose the fact that the Postmaster General had refused the mails of the United States to an institution which he had decided, under the authority of an act of Congress, was engaged in an unlawful business. On the hearing it was decided by Judge Barr, of the Kentucky District, that the act of Congress which conferred the right of seizure on the Postmaster General was unconstitutional, and that, therefore, an injunction would lie to restrain him from withholding complainant's mail, or a mandamus to compel him to deliver it.

Another case urged with great force is that of *Smith vs. Jackson*, 241 Fed. 769. In this case the auditor of the Canal Zone, a ministerial officer, withheld from the district judge what he conceived to be a

reasonable sum for rent, and such additional sum as would represent the proportionate part of his salary for such period as he was absent from the Canal Zone in excess of the time allowed by the act creating his office. The court held that inasmuch as an annual salary had been fixed by Congress, and an appropriation had been made for a sum sufficient to pay it; and that inasmuch, further, as there was at the time no order requiring employees to pay rent, that the auditor had no discretion but to pay the salary fixed by law. In its essential features it has no bearing upon the present case.

The argument of counsel that the District Courts of the United States have concurrent jurisdiction with the Court of Claims in this character of suits under the Act of 1887 is not available in this action, for the reason that the complaint contains none of the allegations of fact required by that act, and for the further reason that process has not been had as that act requires, that the United States is not made a party, but more especially because there is a subsequent act of Congress which probably excepts this class of cases from the operation of that law.

A careful examination of the whole case has convinced the court that Congress not only conferred, but intended to confer, upon the President an unrestricted power of supervision, involving judgment, decision and discrimination, with respect to the entire Canal project and that the courts can exercise no direction thereover; that the complainants do not possess and never acquired a property interest in the privileges which they have hitherto received, and which are the subject of this proceeding, that will sustain the court in granting the relief sought, it being the opinion of the court that these privileges and benefits are revocable at the will of the President; and, lastly, it being alleged that these privileges result to them through a contractual relation which exists between them and the United States, through the President, either the President, or the United States, or both, are the real parties in interest, and that being true this court has no jurisdiction to determine the rights of the parties.

The opinion here submitted has taken a somewhat wider range than the motion filed by the respondents might warrant or require. The scope of the argument indulged by counsel, it may be urged in extenuation, has invited a rather full consideration of the whole case. And, in response to some of the arguments adduced the court may be pardoned if it indulges the suggestion that courts stray afield of their provinces if they discuss the wisdom or the policy of a law. Arguments bearing upon this feature of a statute address themselves to the lawmaking rather than the law enforcing branch of government. A court that yields to inclination ceases to be a court. A law may be burdensome, it may be unpopular, it may offend public sentiment,

but if it be valid the courts are powerless to grant relief against its operation. In this, as in all similar situations, the relief desired should be sought at the source of the stream.

In dismissing the present action the court is not unmindful of the rule that courts should assume rather than decline jurisdiction, for the reason that every citizen who feels aggrieved should have a court in which his cause may be heard, but at the same time there is an equally potent rule which impresses upon the courts the necessity for following established precedents, for otherwise there would be no settled rule or procedure in any given case, and order, in the end, would be forced to yield to confusion.

Let the motion to dismiss be sustained.

AMERICAN FOREIGN BANKING CORPORATION *versus* S. S.
"EVEREST."

(District Court, Canal Zone, Balboa Division, March 11, 1922.)

Admiralty No. 492.

1. ADMIRALTY. "NECESSARIES."

Money advanced to pay tolls on a ship through the Panama Canal is a necessary expense under the provisions of the Act of Congress of 1910 (36 St. L. 604.) giving rise to a maritime lien.

2. ADMIRALTY. MARITIME LIEN. HOW CREATED.

Unless the charter party prohibits the charterer from creating maritime liens on a ship, the master, as agent of the charterer, may make contracts for "repairs, supplies or other necessities" which will bind the ship.

3. ADMIRALTY. PRESUMPTIONS.

It is not necessary for the libellant to allege or prove that credit was given to the ship. This is presumed under Act of Congress of 1910.

Proctor for libellant, *Harmodio Arias*.

Proctor for respondent, *C. P. Fairman*.

KERR, District Judge. On or about the 12th of February, 1921, the S. S. *Everest* was libelled by the American Foreign Banking Corporation for certain advancements made by it upon authority of the master, given to one H. P. Stevens, of Cristobal. Upon arrival of the *Everest* at the Cristobal port it became necessary for it to pay the necessary Canal tolls, and sundry other small expenses. The master in charge, Capt. B. Allen, in order to do this, issued to H. P. Stevens the following order:

No fees having been deposited and no agent appointed for the S. S. *Everest* I hereby appoint Mr. H. P. Stevens as agent to do the needful and facilitate the passage of the vessel through the Canal.

(Sgd.) B. ALLEN,
Master.

Upon receipt of this order Stevens procured from the libellant the necessary funds to enable the vessel to continue, without interruption, its voyage through the Canal. The amount advanced, \$1,904.76 is not in dispute.

It developed later that the *Everest* was under charter to Christoffer Hannevig, Incorporated, and that the real owners were J. E. Murrell & Son, of West Hartlepool, England. Following its custom the libellant made a draft on Hannevig for the advancement. The draft having been dishonored the present libel was instituted against the *Everest*.

It is the contention of the libellant that the credit extended was not to Hannevig but to the vessel, and that the drawing of a draft against Hannevig was only in accordance with an established custom in furnishing credit to vessels passing through the Canal, desiring assistance, and that this had been the custom in dealing with Hannevig. It is asserted by the owners of the vessel that the credit was extended to Hannevig personally, and that the vessel was not liable for the tolls, and was not, therefore, the subject of libel, for the additional reason that the vessel was sailing under a charter contract which required all such advancements to be made by the charterers, and that it was incumbent upon the libellant to ascertain these facts before making the advancement.

The facts of this case submit for considerations some questions with respect to maritime liens that have not been clearly determined by the courts, and any conclusion which this court may reach will not be free from doubt. The act of 1910, upon which this and all similar actions must be determined, provides as follows:

That any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel. 36 Stat. L. 604.

This act very materially changes the former law of the subject of liens. In discussing its provisions the court, in the case of the *Oceana*, 244 Fed. 80, thus defines its purpose and meaning:

Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessities. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessities furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessities ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner *pro hac vice*, and conditional vendee.

That it was the purpose of the act to make more liberal the terms upon which a ship in transit could be libelled for necessities furnished is made evident by the terms of the act itself. In the case of the *Yankee*, 233 Fed. 919, this feature of the act is discussed somewhat at length. In the course of its opinion the court uses this language.

By the Act of June 23, 1910, 36 Stat. 604, Congress attempted to simplify the law and to quiet its controversies by defining when and under what circumstances a maritime lien may be acquired. Compliance with requirements of a State statute as a condition precedent to the assertion of a lien, as held in some cases, is disposed of by making the Federal act supersede the provisions of all State statutes. The distinction between foreign and domestic ports is abolished. The allegation and proof that credit was given to the vessel is no longer required, and a maritime lien, enforceable by a proceeding *in rem*, is afforded "any person furnishing repairs, supplies and other necessities * * * to a vessel * * * upon the order of the owner or owners of such vessel, or of a person by him or them authorized." To stay controversy as to whether another person has been authorized by the owner to procure supplies and bind the vessel, the statute affords a presumption of such authority in certain designated persons or officers, thereby relieving the libellant of the difficulty and sometimes the impossibility of presenting proof of that authority. They are "the managing owner, ship's husband, master, or any person to whom the managing of the vessel at the port of supply is entrusted." Those so entrusted include "officers and agents of a vessel * * * appointed by a charterer or by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel." The Effective Provisions Act, by which Congress disposed of the controversial features of the law of maritime liens, are those which dispense with proof that credit was given the vessel, and substitute a presumption in lieu of proof of the authority of the owner and of a person other than the owner to procure supplies and pledge the vessel. Being relieved of the necessity of proving credit to the vessel and being clothed with the presumption of the validity of the order, the libellant, upon proving delivery to the vessel, enters court with a *prima facie* right to a maritime lien.

It will be noted the statute changes the former law which made distinction between supplies furnished in a foreign port and a home port; and modifies the provisions of the former law, further, with reference to the preliminaries necessary to determine whether the necessities were furnished upon the credit of the vessel, or the charter party, or some individual. These features of the law are further discussed in the *Yankee*. Dealing with these features the Court says:

The authority of the master to bind the vessel itself for supplies, etc., grew out of the necessities of maritime commerce, the business of the ship was to go on. If she found herself in a foreign port, where neither the owner nor master were known, or had individual credit, the right to pledge her for the wherewith to proceed was early recognized as a necessity, and for that reason a lien was accorded him whose labor or capital enabled the vessel thus situated to accomplish the purpose of her being. In such a case the furnisher, in the absence of evidence showing that the supplies were not furnished on the credit of the vessel, was considered as contracting with the vessel herself. The *Grapeshot* (1870) 9 Wall. 129, 19 U. S. (L. Ed.) 651, the *Alligator* (C. C. A. 3d Cir., 1908), 161 Fed. 37, 88 C. C. A. 201; the *H. B. Foster*, (1858) (3 Ware 165), (11), Fed. Cas. No. 6291. The Act of June 23, 1910, extended said lien to domestic vessels, and made it unnecessary to allege or prove that credit

for the supplies, etc., were given to it, but it did not obviate the necessity to allege and prove that said supplies were in fact furnished to the vessel. This does not mean that the material man must personally see that the goods are actually put on the vessel. If the supplies are furnished on the orders of the person to whom its management has been lawfully intrusted at the port of supply, and which pursuant to the orders of such person were forwarded in the manner indicated to a designated place, from which they were taken by such person to the vessel where it was at work, such supplies are furnished to it within the meaning of the Act of 1910.

Section 2 of the Act of 1910 contains this provision:

That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. 36 Stat. L. 604.

Section 3 contains the following provision:

That the officers and agents of a vessel specified in Section 2 shall be taken to include such officers and agents when appointed by a charterer by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor. 36 Stat. L. 605.

The authority of the master in charge of the *Everest* to bind his vessel for the advancement in question, being necessarily involved, the provisions of the charter party contract between the owners and the charterers becomes important. The only provisions bearing upon this subject are as follows:

2. That the charterers shall provide and pay for all coals except as otherwise agreed, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers or crew), and all other usual expenses except those before stated.

8. * * * The captain (although appointed by the owners), shall be under the orders and direction of the charterers as regards employment or agency. * * *

It will be noticed that this provision, while it imposes upon the charter party the obligation to pay the charges advanced by the libellant, does not provide, in terms, that the charterer shall not place any liens upon the vessel. It would seem, in the absence of an express prohibitive provision to this effect, that such a lien may be imposed, and that the provision which required the charterer to pay these charges is an undertaking between the owner and the charter party, and does not deprive one furnishing necessities of a lien.

In the *South Coast* (N. D. Cal. 1916), 233 Fed. 327, it was held that the furnisher of supplies to a vessel on the order of the charterer was entitled to a lien as there was nothing in the provisions of the charter depriving the charterer of authority to bind the vessel. The Court said:

Indeed, they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel arising or created during the term of the charter party. The Act of June 23, 1910, gives a maritime lien to any person furnishing supplies to a vessel, whether foreign or domestic, upon the order of the owners, which lien may be enforced without alleging or proving that credit was given to the vessel. It also provides that the managing owner, ship's husband, or master, appointed by a charterer, or an agreed purchaser in possession of the vessel, shall be presumed to have authority from the owner to procure such supplies.

In the absence of a provision which denies to the master the right to pledge the ship for necessities, even the one furnishing the supplies be warned by the owner that supplies can not be charged to the ship's account, the master may, nevertheless, bind the ship for necessities. The court, in the above decision, thus discusses that feature of the law:

But by the charter in the instant case the person ordering the supplies—that is to say, the master—was not without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor. The case presented here is different from that of the *Eureka* (N. D. Cal. 1913) 209 Fed. 373, because in that case the option to purchase provided that the holder of the option, though given possession of the vessel, should not incur any lien upon her, nor make any purchases on her account. The present charter contains no such provision, but on the contrary by its very terms contemplates that the charterer should have authority to bind the vessel, and the owners, having executed such a charter and delivered the vessel thereunder, were thereafter without power to prevent the creation of the liens provided for by the act above mentioned, their remedy being against the charterer upon his agreement to hold them harmless from such liens.

Under the charter contract existing between the parties to the undertaking between the owners and Hannevig, there is an express provision that "The captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment or agency," and in the absence of any prohibitive provision with respect to pledging the ship for necessities, it would seem to follow from the decisions above quoted, that the libellant was not obligated to look beyond the ship as security for the advancement made. The manager of the libellant, George S. Schaffer, explained the custom which obtains at the Canal with respect to making this character of advancement, and also with respect to what was done by his company in the present instance. At page 4 of his evidence he testified as follows:

We have in many cases financed vessels before we knew who would be responsible for the bills, we then investigate the charterers or owners, or discover who may be responsible for the bills, and draw upon them as a means for collection only, if we finance a vessel under charter and draw upon the charterers, we do that as the most convenient method of collection, and not because we have performed the

transaction on the strength of the charterer's credit. * * * The operation is very much like that of discounting a draft, we may discount a draft for one man who is not very good on the credit of a second man, the man we first collect or draw on may not be as good as the man who sells to us, but we know we have one sound person in the transaction. Similarly, in financing ships, we look to the ship, and then if we have trouble in getting our money from the other fellow, we go right back to the ship, and that is what we have done in this matter.

That the advancement was made on the credit of the ship and not on the credit of either the owners or the charterers is testified to by him at pages 8 and 9 of his evidence in clear and unmistakable terms:

Q. What representation did he make in regard to payment of these tolls, and who was to pay them at the time he asked you to advance this money?

A. That I can not answer, because I was not present.

Q. You are unable to state whether or not he represented that the amount would be paid by C. Hannevig, Inc., or that it would be paid by the owners of the steamship *Everest*?

A. I am unable to state that, but it would not have made any difference what he had represented, it would not have altered the basis of our credit no matter what Stevens told us, we knew the ship was good for it, and even if he told us John Jones in Kalamazoo would pay us, we would still consider the ship liable and simply use the other gentleman as the quickest method of getting our money back.

Q. That is what you had in mind, you were holding the vessel as responsible for the money?

A. Yes, sir.

Q. Irrespective of any charter party?

A. Yes, sir.

Q. And irrespective of your knowledge or lack of knowledge of that charter party?

A. We do not concern ourselves with the charter party.

Q. Even though you know such charter party was in existence?

A. We had no knowledge, I can state, of the charter party.

In the *South Coast* case, above quoted, Mr. Justice Holmes, upon a writ of *certiorari*, 251 U. S. 519, went even farther than the lower courts in holding that the master may impose a lien in the absence of an express prohibition, thereby relieving the one making advancements from doing more than was done by the libellant in the present case. Justice Homers said:

But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners *pro hac vice*, and, therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it can not be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

And in *Coyle vs. North America*, 262 Fed. 250, the proviso clause of the Act of 1910 was discussed by the court in a way to indicate that under the present law, even though the one making advancement knew that the ship was under a charter contract, there existed no obligation to ascertain the conditions of the contract before making the advancement. Said the Court:

The mere fact that one knows or is informed that a ship is under charter is not enough to charge him with notice of the terms of the charter party. The *George Dumois*, 68 Fed. 926, 15 C. C. A. 675. In the case just cited the claim was for coal furnished to a ship in a foreign port on an order given by one known to be the charterer of it. The coal was received by the master and officers of the ship was a necessary supply to the ship, without which the voyage could not have been prosecuted, and was used by the ship in prosecuting the voyage. That case arose and was decided before the enactment of the above-mentioned Act of June 23, 1910, relating to liens on vessels for repairs, etc. It was held that under the law as it then existed a lien on the ship resulted from the furnishing of supplies under the circumstances stated, unless it was shown that the furnisher relied on the ship, and that, though the furnisher knew that the order for the coal was given by the charterer, he was not bound to know the terms of the charter party, which in fact included a provision requiring the charterer to pay for such supplies. If there had been no change in the law, that decision would be an authority supporting a ruling in the instant case that the furnishing of coal by the libelant was under such circumstances as to have the effect of creating a lien on the ship.

Under the law as it existed prior to the Act of 1910, the furnisher was certainly obligated to make inquiry when it was made known to him that the ship to which the supplies were furnished was under a charter contract, and to become acquainted with the terms of the charter agreement. The authorities quoted and relied upon by counsel for the owners in the present case make this clear, but that there has been a radical change in the law by the Act of 1910 is quite patent. Most of the authorities furnished by counsel antedate the present law. In so recent a case as the *Muskegon*, 275 Fed. 117 (Advance Sheets) the court refers to the fact that the *Rate* and the *Valencia* are no longer authorities upon this point, and says, "The putative lienor is not bound whenever he gets an order to supply or serve the ship, to institute an inquiry; else he would never be safe and the act would be idle." The preceding case of the *St. Johns*, 273 Fed. 1005, is to the same effect.

In considering the present case the court has assumed that the Act of 1910, under the issues as presented, applies, and that the advancements which were made were necessities within the meaning of the statute. That which would prevent a ship from completing its voyage, would, when obviated, constitute a necessity, as much so as the furnishing of coal, or other ship supplies, without which the voyage could not be completed. The ship could not have earned the fees contemplated if its voyage had been terminated at the Canal, and

the service rendered was a necessary service not only to the charterers, but to the owners also, insofar as the rental service was dependent, it may be assumed, upon the fees earned by the ship.

While realizing that the questions here presented are not wholly free from doubt, as before stated, it is the conclusion of the court, after a careful consideration of the whole case, that a decree should be made in favor of the libellant. A judgment, therefore, may be drawn so holding.

UNITED STATES *versus* ALMOGUERA.

(District Court, Canal Zone, Cristobal Division, April 1, 1922.)

Criminal No. 1311.

1. SEARCH WARRANT. ILLEGAL SEARCH AND SEIZURE. EVIDENCE.

Defendant was steerage steward on a ship lying in Cristobal Harbor. He had a room on board ship to which he had the key, and to which no one else had access. In his absence, with the master's consent, a Zone policeman broke open the door and found a quantity of narcotics in the room, the possession of which is prohibited by the Harrison Narcotic Act. These narcotics the policeman seized and this prosecution was instituted against the defendant for having the same in his possession. Held,

1. That such search and seizure was illegal.
2. That to admit the evidence so obtained would in effect be compelling the defendant to be a witness against himself, and that such evidence is therefore inadmissible.

Attorneys for the Government, *A. C. Hindman*, United States District Attorney and *J. J. McGuigan*, Assistant District Attorney.
Attorneys for defendant, *W. C. Todd*.

KERR, District Judge. The defendant, Almoguera, was a steerage steward on the *S. S. Ecuador*, which on the day in question was lying at one of the docks at Cristobal. The defendant had assigned to him a room for his personal use, to which he carried the key, and to which no one else had access. At a time when the defendant, Almoguera, was absent a member of the Canal police force, with the consent of the captain of the steamship, broke open the door of his room, and took therefrom certain articles of a narcotic character, the possession of which for certain purposes is prohibited by the Harrison Narcotic Act. It is contended that this act on the part of the officer was a violation of the Constitutional inhibition against unlawful search and seizure.

There is no duty laid upon the courts greater than that of protecting the citizen against any violation of those liberties and fundamental rights which are guaranteed under the provisions of the Constitution.

There is no personal guarantee that is more sacred, or better recognized than that which protects the prisoner from giving compulsory testimony against himself. To protect a prisoner in this guarantee is a solemn obligation laid upon every court wherever the English law is dominant. For its violation the law offers no excuse; for its enforcement it holds the courts responsible. So jealous have been the courts in protecting the citizen from any violation of this right under the Constitution of the United States it has been held that oral or written testimony is not the only character of testimony that a witness may not be required to give against himself under a compulsory process. The Constitution of the United States goes to the length of protecting its citizens from such incriminating evidence as may be obtained through an unlawful search of one's premises by one of its officials. It is just as much a violation of the right of self-incrimination through compulsory processes to search one's home, illegally, and use any evidence of guilt thus obtained, as it would be to make the accused testify against himself on the witness stand, or to force from him an unwilling confession. When, therefore, we permit the zeal of an officer of the law, however commendable his purpose may be, to violate this sacred right, to excuse his act, or to lend sanction thereto, marks a step that leads toward the invasion of those rights which are the sacred possession of every citizen that claims protection under the organic law of the United States. No law, however meritorious, can be enforced if its enforcement be sought at the expense of a Constitutional guarantee. So far do some of the more recent tendencies of legislation carry us toward a purpose to have the Constitution interpreted in favor of the will and purpose of the legislative, that it is fast becoming apparent that the Constitutional guarantee of the citizen more than ever must be saved to him through the interposition of the courts.

Among those rights which the organic law proclaims as sacred, none is more important than that which protects the citizen from an unreasonable search of his home. The King of England can not search a peasant's home without a warrant. No office of the law can search the home of an American citizen without a warrant, and no evidence obtained by an officer in such a search can be used against the proprietor of that home. Courts err, therefore, when they attempt to condone the act of an official as a harmless or mere technical violation of this right. The right of asylum exists without modification, and is too sacred to be trifled with by any emissary of the law. While it is true the preservation of society depends upon an enforcement of the law, nothing will sooner destroy the safeguards of society than a sanction by the courts of any invasion of an individual right for the purpose of administering the law.

In the present case information was filed against an individual for having prohibited articles in his possession with the intent of selling them in violation of a statute of the United States. The only tangible proof against him is the fact that a government officer found in his room, on a vessel lying at dock in Cristobal, certain of these articles. His room was forcibly entered, in his absence, by a Zone policeman, with the consent of the captain of the vessel. The only possible justification of this act was the consent of the captain of the boat. Without this consent the officer would have had no color of right to have invaded this man's private room without a search warrant, issued as required by law. Could a landlord give an officer consent to enter the house of a tenant and make search? Clearly not. What in principle then is the difference? That room was as sacred to the steerage steward in law as would be the castle to the lord. It had been assigned to him, and he carried the key thereto. It could be invaded by an officer of the law, and searched, only in the manner prescribed by law. If this court could not have entered an order, as it could not, permitting such a search by an officer, certainly a ship captain could not give such an order or permit. A misuse of authority is the parent of illegal coercion, and illegal coercion is a violation of individual rights.

The defendants may be guilty. The probabilities are that they are, but it is better that they go unpunished than that they should be convicted on illegal testimony. Let their cases be dismissed.

SATTLER, *et al.*, versus S. S. "URUBAMBA."

(District Court, Canal Zone, Cristobal Division, April 1, 1922.)

Civil No. 386.

1. ADMIRALTY. PLEADING. JURISDICTION.

Where it appears that libellants were employed as mariners by the S. S. *Elizabeth*, a vessel owned by the company which owns the *Urubamba*, at Cardiff, in Wales, for a voyage to Callao, Peru, and the voyage was completed and libellants claim they were to be paid in English gold pounds but that they were paid off in Peruvian paper pounds, under their protest, and where they sought to libel the *Urubamba* in the Canal Zone for the difference between the value of the Peruvian pound and the English pound, and where the plaintiff's libel does not set out the applicable English law, it is held that the court can not take jurisdiction of the action.

2. INTERNATIONAL LAW. COMITY.

This court has no authority in such a case to do more than enforce the law of a foreign jurisdiction as a matter of comity.

Proctor for libellants, *C. P. Fairman*.

Proctor for respondent, *A. C. Hindman*.

KERR, District Judge. The libellants were employed at Cardiff, Wales, by the Peruvian Steamship and Dock Company, of Callao, Peru, as mariners, to serve on the steamship *Elizabeth*, a vessel owned and controlled by the said company. The usual shipping articles were signed in Cardiff. The voyage was completed as contemplated. It is claimed by the libellants that under the terms of their contract they were to be paid in English gold pounds, but that upon their arrival in Callao, Peru, they were paid off in Peruvian paper pounds. Libellants protested against payment in Peruvian money as a violation of their shipping contract. They sought legal redress in Peru, but seem not to have been able to get any one interested in their claim, and were compelled to leave Peru by order of the police authorities on the steamship *Urubamba*, and while on this vessel were paid the balance due them in Peruvian money. Upon arrival of the *Urubamba* in Cristobal the libellants were removed from the vessel and placed in quarantine in Colon, and while thus quarantined brought this action to recover the difference in money between what was paid them in Peruvian money and what was due them in English money, and to secure the payment of the sum claimed, \$5,000, libelled the vessel on which they had been brought to Cristobal, the *Urubamba*, the property of the company with whom their contract had been made in Cardiff.

From this brief statement of fact it will be seen that the vessel libelled is a foreign vessel, owned by a foreign corporation; that the libellants are foreigners, sailing under a contract made in a foreign port, and that the breach of contract of which they complain was made in a foreign country. Under this state of fact it is claimed by the respondents that this court has no jurisdiction to hear and determine a controversy that is wholly extraterritorial.

Apparently this was an English contract and so remained throughout. Under well-determined precedents an English contract must be determined by English law. If this court should assume jurisdiction it would be necessary for the libellants to have pleaded the law of England with reference to a breach of contract in a foreign port. For what this court knows there may be a provision in the contract itself, or it may be the law of England that all controversies shall be determined by the law of the place where the controversy arises. The courts of the United States make it incumbent on the libellants to allege and prove the law of the place where the contract is made whenever redress is sought for a breach thereof. The courts of the United State have no authority, nor has this court, to do more than enforce the law of a foreign jurisdiction as a matter of comity. To do this the court assuming jurisdiction must know what is the law of the place where the contract was made, or the liability incurred. The *Hanna Nielson*, 273 Fed. 171.

The vessel libelled is not the vessel on which the libellants shipped. The court has not been furnished with any authority holding that a vessel not a party to the controversy can be libelled by seamen having a contract with another vessel, even though the vessel libelled belong to the same company.

The assumption of jurisdiction by the courts of the United States, in determining disputes that are wholly extra jurisdictional, is always a matter of grace rather than obligation. It seems clear to the court in the present instance that inasmuch as jurisdiction to enforce a libel against a vessel not party to the controversy would be doubtful in any event, and since, further, the entire cause of action occurred without the jurisdiction of this court, jurisdiction should not be assumed.

Let the libel, therefore, be dismissed.

PANAMA CANAL, *ex rel.*, MOHR *versus* DAVIDSON, Administrator,
SCHUBER ESTATE.

(District Court, Canal Zone, Balboa Division, May 6, 1922.)

Civil No. 507.

1. CONTRACT. WHAT CONSTITUTES.

Where the minds of the contracting parties do not meet, no contract results.

In this case, deceased in his lifetime employed The Panama Canal to repair a boat. The Panama Canal gave to Schubert an estimate of the cost of such repairs and Schubert deposited the amount thereof with The Panama Canal. Held, that so far and no further there was a contract in the absence of proof that the deceased in his lifetime ordered other work than the repairs covered by the estimate.

For plaintiff, *A. C. Hindman*, United States District Attorney.
Attorney for defendant, *E. M. Robinson*.

KERR, District Judge. This is an action by The Panama Canal against the Administrator of the Estate of Francis Schubert, deceased, in which it is sought to recover \$11,504.45 for repairs done on a boat which had belonged to Schubert. An estimate of cost was made before the work was begun, and the amount covered by the estimate, \$3,020, was paid to The Panama Canal. It is claimed by the defendant that this deposit was made in full discharge of all work that was to be done, and that the plaintiff can not collect for any excess over this sum, unless the excess had been ordered by the deceased, or acquiesced in by him before his death, or by his administrator since his death.

The proof on the issues involved is not as full as might be desired. It appears that there was included in the work to be done the over-

hauling and repairing of a certain engine which had been purchased by the decedent, which engine was to have been placed in the boat when repairs were completed.

The only proof in the record with reference to the value of the boat, before the repairs were begun, fixes the fair market value at \$650. Presumably this does not include the engine, which was valued at \$3,500.

The boat, without the engine, was sold under the orders of the court, after Schuber's death, for the sum of \$4,000, which sum is now held by the court. The engine, so far as the proof shows, is still in the possession of the plaintiff.

Of the amount claimed, \$3,385.98 was spent on the engine, and \$8,118.47 on the schooner, towage, dockage, and incidentals.

It seems to be the custom of the Canal to first make an estimate of the cost of the proposed work, and then to require a deposit covering the amount of the estimate, and when the deposit is exhausted to either cease work or require an additional deposit. The proof bearing on this subject may be briefly noticed.

At a hearing had before former Judge Hanan the witness Elwyn Greene, at page 4 of the record, testified as follows:

WITNESS. When a deposit is made by a person who wishes work done, he is given a receipt, and he presents that receipt to the Mechanical Division as evidence of his deposit, and they will then go ahead and do the work to that amount, if the work calls for a larger expenditure than that they call for an additional deposit to be made, that is the usual and ordinary procedure. The deposit when made is simply a question of holding in suspense in the collector's office the payments to The Panama Canal, that is, when the amount of the bill can not be determined at the time payment is made, that is all our deposit account means, in other words, we do not know just what our bills will be for the work because The Panama Canal renders their bills always on cost, and never undertakes to make a contract for work at a particular price, and only render our bills for our actual cost, consequently the amount of work to be done can not be definitely determined at the time the work is requested.

* * * * *

DISTRICT ATTORNEY. Does The Panama Canal withhold or deduct from the deposit so made the value of the work so done.

A. It does.

Q. Is that the purpose of the deposit?

A. That is the purpose of the deposit. All bills are applied against the deposit, and the balance is refunded as soon as all of the bills are charged against the deposit.

* * * * *

CROSS-EXAMINATION. By Mr. MacIntyre.

Q. Are both these percentages charges over the actual cost?

A. Over the actual pay-roll cost.

Q. Now, Mr. Greene, when a man takes a job to be done to The Panama Canal, before you accept it you first of all figure out what the actual pay roll cost will be on the job?

A. We can not do that.

Q. But you get as near to it as you can?

A. We estimate it.

Q. Then, to that estimate you add 30 plus 10 for overhead, and add them together to get the actual cost, and require a deposit of at least that amount before The Panama Canal touches the work?

A. That is the usual procedure.

Q. And that procedure is well known to all the people in Panama who have work done by the Canal?

A. Yes.

Q. It is a matter of general knowledge that The Panama Canal will not do work in the shops until there has been a cash deposit of enough to cover the estimated cost of the work plus the overhead?

A. (Interrupting). Yes.

Q. (Continuing). And is it not a fact, Mr Greene, that in most cases there is a little something left to be returned on that deposit?

A. I presume that nine out of ten cases a refund is made to the depositor.

* * * * *

At page 22 the witness W. G. Brown, for the plaintiff, testified to the same effect:

MR. MACINTYRE. Is it not a fact that planners do not authorize work until there is money to cover the estimated cost?

Q. And they do not authorize work after that estimate has been exceeded.

A. That is as I understand it.

At page 47, of the record in the hearing before Judge Hanan, the witness Arthur J. Sweet, testified as follows:

MR. MACINTYRE. Well, if there is a deposit of \$3,020 made to the Mechanical Division for work to be done, have you any circulars or rules of the department allowing you to do \$11,000 worth of work?

A. The deposit is always an estimate, and it is not a definite statement.

Q. You still do not answer my question. Do you have any rules in your department permitting you to do more work than the estimate and deposit call for?

THE COURT. (Interrupting). The question is whether under your rules, when there is a deposit of three thousand dollars put up, you can go on right ahead and incur an expense of eleven thousand dollars, eight thousand dollars in excess of the amount of the deposit, as an approximate amount of the work to be done.

A. There is not.

MR. MACINTYRE. Is there any rule or circular in your department or the Canal concerning that?

A. I can not say definitely.

Q. Is it not a fact that when you find the repairs on a job are going to exceed the deposit you call on the owner of the work for additional deposit.

A. Yes.

Q. That is almost the invariable rule?

A. When we find it out.

Q. In this particular case in question, did you ever call for any deposit over the three thousand dollars?

A. No.

Q. Ever issue any estimate to him for over three thousand dollars?

A. No.

At page 73, the witness J. F. Davidson, for the defendant says that Mr. Schuber expressed great surprise when shown a bill for the amount

claimed in this action, and said he had thought something was coming back to him out of his deposit. At page 77 he further testified as follows:

MR. MACINTYRE. Ever see the Governor about it?

A. I talked with Governor Harding about the ship.

Q. Did Governor Harding ever admit to you in a conversation that Mr. Schuber had not authorized repairs over three thousand dollars?

A. We were talking about the bill, and he said they made a mistake somewhere.

Q. The Governor himself told you that?

A. Yes.

Q. Ever have a talk with Mr. Kintner about it?

A. Yes.

Q. Did Mr. Kintner ever tell you Schuber had authorized more than three thousand dollars repairs on that boat?

A. No.

Q. What did he say?

A. He said he objected to the taking of the job; he realized there would be a bigger bill than the man would expect to pay, and he objected to the job.

It would appear from this testimony that there must have been some misunderstanding between the parties with reference to the whole matter. If there was an agreement between the agents of the plaintiff and the decedent that the deposit covered all the work that was anticipated, clearly, as a matter of law, there was no meeting of the minds of the parties for an excess over that deposit, so far as the proof shows. This being true there could be no recovery. Even the equities of a *quantum meruit* can hardly be invoked by the plaintiff when it is considered that the boat sold, with all the repairs for barely enough to repay the deposit and the estimated value of the boat at the time the repair work was begun.

It appears from the proof that certain towage and shifting charges, aggregating \$582.55, were authorized, directed or acquiesced in by the administrator after his appointment. This sum was deducted by the plaintiff from the deposit. When Schuber died the relations between him and the plaintiff ceased. The deduction could not, therefore, be made by it in this manner. That sum should be charged to the administrator.

On the whole case it would seem that the only decision the proof warrants is to make application of the entire deposit of \$3,020 to the work done on the schooner. The engine is still in the possession of the plaintiff and has never been repaired sufficiently to be in working condition. No recovery could, in any event, be had at this time, for any work done on it. In addition to the deposit the plaintiff should recover from the estate of Schuber the sums expended after his death by the administrator, including the \$882.55. For this amount, whatever it is ascertained to be, the plaintiff should have a preferred lien on the fund of \$4,000 now in court. If the parties can not agree on this amount the court will fix it.

McGRATH *versus* PANAMA R. R. CO.

(District Court, Canal Zone, Balboa Division, May 20, 1922.)

Civil No. 522.

1. ADMIRALTY. STATUTE OF LIMITATIONS. LACHES.

Plaintiff brought an action for personal injuries received on board defendant's steamer while on the high seas. Defendant pleaded the statute of limitations and laches, it appearing from the complaint that the injury received was sustained 15 months before the date of bringing suit. Held, that the statute of limitations of 1 year in other cases of injury to the person will be applied to this case by analogy, there being in the admiralty law no specific statute of limitations, and that the plaintiff's action is barred by her laches.

2. ADMIRALTY. STATUTE OF LIMITATIONS OF FOREIGN JURISDICTION.

The law of the Republic of Panama limiting the commencement of such actions to 3 years after the date of the injury does not apply in this jurisdiction.

(NOTE. Case affd. by 5th C. C. A. 298 Fed. 303.)

Proctor for libellant, *Oscar Teran*.

Proctor for respondent, *A. C. Hindman*, United States District Attorney.

KERR, District Judge. The plaintiff is an American citizen. The defendant is an American corporation. Damages are claimed as the result of an injury inflicted on the plaintiff while a passenger on a steamship belonging to defendant. The injury alleged occurred about 14 or 15 months prior to the filing of the suit. The action is brought in admiralty. It is claimed by the defendant that the action is barred by limitation, or laches. There seems to be no fixed period of limitation in admiralty. The statute in force in the Canal Zone fixes the limitation for actions of this character at 1 year.

While the admiralty courts have not fixed the statutory period as the bar where laches are plead, the weight of authority seems to be decidedly in favor of that period as a guide to the courts in determining the staleness of a given claim.

The plaintiff relies upon the Colombian statutory bar of 3 years, and in support of this contention quotes the Executive Order of May 9, 1904, to the effect that "the laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904" shall govern. When the reason for a law fails the law itself fails. It can hardly be contended that a citizen of the United States, or a corporation formed under the laws of one of the States of the United States, are better acquainted with the Colombian Code than they are with the laws of their own country. It would seem an anomaly to invoke the laws of a foreign jurisdiction in action between citizens of the United States, in a court created by the United States. Un-

der existing conditions the occasions when the Executive Order referred to can be invoked must be few, and these few must continue to grow fewer. To invoke the admiralty practice and laws of Colombia in an action between citizens of the United States, for an injury committed upon the high seas, would seem too untenable to be considered.

The case of *Western Fuel Company vs. Garcia*, decided by the Supreme Court of the United States, quoted by plaintiff, is decidedly against his contention.

Let the demurrer be sustained, and leave given to the plaintiff to file an amended petition showing cause, if she can, why her action was not instituted within the statutory period of 1 year.

OTERO *versus* MARYLAND CASUALTY COMPANY.

(District Court, Canal Zone, Balboa Division, January 27, 1923.)

Civil No. 524.

1. ACCIDENT INSURANCE. CONTRACT. PLEADING CONDITIONS PRECEDENT.

In a suit on a policy of accident insurance, where the policy is set out as a part of the complaint, it is sufficient for a plaintiff to allege generally that the plaintiff has complied with or performed the conditions precedent contained in the contract binding upon him, without alleging definitely the acts performed by him.

2. PLEADING. DEMURRER. WHAT CONSIDERED.

An original complaint was filed and afterwards an amended complaint. The action was begun when the original complaint was filed but the amended complaint does not show when the original complaint was filed. On demurrer to the amended complaint the court can not consider any fact shown by the original complaint or the records or files other than the amended complaint and the demurrer thereto.

3. WORDS AND PHRASES. "IMMEDIATELY."

The word "immediately" used in an accident policy relating to disability entitling plaintiff to recovery, means "presently and without any substantial interval of time." It does not mean "a reasonable time," and it is held that an injury which did not produce disability for 16 days was not an "immediate" disability.

Attorneys for plaintiff, *Todd and McIntyre* and *C. P. Fairman*.
Attorney for defendant, *Felix E. Porter*.

WALLINGFORD, District Judge. The following order relates to a demurrer interposed by the defendant, Maryland Casualty Company of Baltimore, Md., to the complaint of Miguel A. Otero for indemnity for personal injuries resulting in his alleged total disability, and which action is based on defendant's accident insurance policy issued to him.

The insurance policy which is made a part of plaintiff's amended complaint and which was in force on date of plaintiff's accident provides in substance that in consideration of the agreed annual premium the defendant does insure plaintiff in the sums therein stated against bodily injuries effected directly and independently of all other causes through external, violent and accidental means "which shall immediately, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation."

Another provisions of said policy, in addition to outlining the time and nature of the notice to be given to the insurer by the insured of any injury he may sustain, recites that "Legal proceedings for recovery hereunder may not be brought until after 3 months from date of filing final proofs" at defendant's home office, * * * and that "failure to comply with any of the requirements contained herein shall invalidate all claims under this policy."

Plaintiff in his amended complaint filed on October 26, 1922, alleges that on August 21, 1920, he accidentally and with great force and violence struck his left hip against the rim or edge of an iron bath tub, thereby causing him great pain and creating a severe external bruise thereon; that an internal abscess developed at or near the point of said external injury, that he had to submit to surgical operations thereon, that he was subjected to constant medical attention and that from on or about September 6, 1920, until on or about June 6, 1921, and thereafter, he was totally disabled and prevented from performing the duties pertaining to his occupation; that he gave defendant written notice of his injury and of the particulars in relation to same, that thereafter and upon the request of defendant's agent he, on June 6, 1921, forwarded to defendant proof of the injury sustained and of his disability resulting therefrom and that he "has, in all respects, precedent and subsequent, complied with the terms and conditions of the said contract for accident insurance."

To the amended complaint of plaintiff a demurrer has been filed by insurer raising among others the three following propositions, viz.:

1st. That the amended complaint is fatally defective in respect to not showing any substantial compliance with the provisions of the contract respecting notice of injury and disability, and that the allegation that in all respects precedent and subsequent plaintiff has complied with the terms and conditions of the contract merely is a conclusion of the pleader.

2d. That plaintiff's alleged cause of action was instituted prematurely in that on June 6, 1921, he furnished defendant proof of his injury and resulting disability and on August 16, 1921, as shown by the court records did institute this suit, in contravention of the clause in the insurance contract that no legal proceedings for recovery may be brought until after 3 months from date of filing final proofs.

3d. That said amended complaint affirmatively shows on its face that plaintiff's claimed injury did not result independently of all other causes in immediate and

continuous total disability as prescribed in the insurance contract, but that on the other hand his claimed disability followed and only began some 16 days after his alleged accident.

In respect to the time when a suit is considered instituted, section 45 of the Code of Civil Procedure of the Canal Zone provides that "An action shall be deemed commenced within the meaning of this chapter as to each defendant at the date of the filing of the complaint in court."

The record and court files pertaining to the case at bar show that the original complaint was filed herein on August 16, 1921, that summons thereon did issue, was served on the defendant and was filed herein with the marshal's return endorsed thereon on August 17, 1921.

In reference to the first urged objection to the effect that the complaint does not adequately allege a performance of the necessary conditions precedent respecting notice to defendant and furnishing it proofs of claim, it is sufficient to say that a general averment of compliance with all of the conditions of the policy usually is considered sufficient.

A "condition precedent" in a contract has been held to be "an act to be performed by one party before the accruing of the liability of the other party, and proof of such a condition does not vary or contradict the terms of the contract, but shows that no contract between the parties ever became effective." In other words the agreement is made in form, but does not become operative as a contract until some future specific act is performed or some subsequent event occurs.

Cavanaugh vs. Iowa Beer Co. 136 Iowa, 236, or 113 N. W. Rep., 856.

Mortock Ins. Co. vs. Fostoria Novelty Glass Co. 94 Va., 361 or 26 S. E., 850.

The greater weight of authority supports the view that a mere allegation of performance is all that is required, and that such an allegation need not be supported necessarily by any definite averments of facts. Plaintiff in his pleading sets forth that in all respects precedent he has complied with the terms and conditions of said insurance contract. In any trial involving this issue it would rest upon plaintiff to prove either a compliance with the requirements of the contract or to plead and prove either allegations that would excuse failure to perform or a waiver thereof. A failure so to do would result in his defeat. The conclusion is that the above objection number one is not well taken.

The second objection urged also pertains to an alleged failure to comply with a condition precedent in that it is asserted that 90 days did not intervene between the date of the last proof furnished defendant on June 6, 1921, and the commencement of plaintiff's suit on August 16, 1921. The record shows that the plaintiff began his

action by filing in the clerk's office his original complaint on August 16, 1921, but the amended complaint now under consideration on its face does not disclose when this suit was instituted. Of course in considering a demurrer to any pleading, no other pleading than the one attached and no other part of the record is to be considered. If the attached pleading is sufficient, it should be allowed to stand. The amended complaint attached in this case contains the said averment of there having been a full compliance with all of the conditions precedent set forth in the insurance policy. As stated in the last preceding paragraph such a general averment is sufficient for the purposes of the demurrer. It is a mandatory provision of the policy that at least 90 days must pass before litigation may properly ensue. The same, however, is one that may be waived by the insurer. However, from all that appears from the amended complaint in and of itself, it is not affirmatively disclosed from a reading thereof that the plaintiff is barred from maintaining his action. So far, therefore, as this second proposition is concerned, it also is denied. (Vol. 1 C. J. B. 493, sec. 263).

In addition to what already has been said relative to the foregoing first and second propositions it may be suggested that the question of waiver of other formal proofs and of the time of bringing suit is not now involved. The amended complaint in its present form sets forth no averment of waiver or no allegations of facts constituting an excuse for failure to more exactly comply with the conditions precedent contained in the policy. The demurrer deals solely with the amended complaint, and its consideration does not include the allegations of the original complaint or of any of the record made in the former trial. It may be said, however, that if the said proposition of waiver was being presented now in any pleading, it necessarily would have to be sustained, assuming that a proper pleading of facts and circumstances not disputed would be made as outlined in plaintiff's brief on said subject.

It is the plaintiff's contention in respect to the third and last proposition that a disability is "immediate" when it results after an accident within the time required by the laws of nature for the cause to produce the effect, and he cites the last sentence of section 178 in vol. 1, C. J., page 468, and the one Kansas case cited therein of *United Commercial Travelers vs. Barnes*, 80 Pac., 1020, in support thereof. In that case the insured on July 23, 1902, unknowingly swallowed a pin, but he was not confined to his bed until the fourth day of the following month. The Kansas court did adopt the reasoning that, "If it be admitted that the word 'immediately' does not mean instantaneously, at once and without delay, then a greater stretch of the conditions can not be said to be unreasonable in allowing for the period that nature halts before inflicting penalties for her violated laws."

A search of the authorities available indicates that such is the general holding as to the interpretation of the word in question in three or four or perhaps more of the States throughout the Union, but the greater weight of authority is against any such interpretation and for the reason that an amplification of the meaning of the word "immediate" is no more or less than an attempt to modify or change the plain, unambiguous words of the contract. It can not accurately be said that the word "immediate" as applied to accident insurance contracts is ambiguous. The clear intention of the insurer as expressed by the contract in suit is to indemnify the insured for a premium of \$30 against an immediate disability or a disability that results presently and without any substantial interval from the accident sustained. Because of the relatively low amount of the annual cost, the parties to the contract did agree that there would be excluded therefrom any liability for indemnity growing out of disability which might become present some time after the accident might have been sustained. The writer of the section in *corpus juris* referred to above states that "In a majority of the cases the courts on a consideration of the context have found that the word immediately" in the connection mentioned is used as an adverb of time, although in some cases it has been interpreted as signifying causation and not time. The principal difficulty, however, in these cases has not been to ascertain whether the word "immediately" signifies proximity of time, but rather to determine how soon after the infliction of the injury the disability must result in order to come within the designation. It is generally agreed that "immediately" as so used does not mean instantaneously or without any interval of time, and is not, on the other hand, equivalent to the phrase "within a reasonable time," but requires that the disability shall result presently and without any substantial interval."

In the case at bar 16 days, so far as the allegations of the complaint show, intervened between the date of plaintiff's accident and his asserted disability. From a study of the entire contract, it appears clear that 16 days properly can not be considered as "presently" and as without any substantial interval between the cause and the effect. This conclusion, as above stated, is supported by the greater weight of authority and with the better reason.

In the case of *Herwig vs. Business Men's Acc. Ass'n. of America*, 234 S. W. Rep. (Mo.), 853, a physician injured one of his eyes in an accident, but was able to continue his practice for 2 months before he quit by reason of defective eyesight, and the court of that State held that he was not "immediately, totally, and continuously disabled" within the meaning of his accident-insurance policy. The Missouri court further stated that "The word 'immediately' was inserted in

the contract of insurance to fix the time when the disability must occur. It is often difficult to determine whether or not a particular accident is the proximate or remote cause of the injury. The word 'immediately' was, no doubt, placed in the policy to guard the defendant against liability for disabilities which might not be directly and without delay caused by the accident but which might be due to remote or intervening causes occurring after the accident."

In support of such ruling the Missouri court cites a list of cases from the States of Missouri, Indiana, Illinois, Georgia, Wisconsin, New York, and Kentucky.

In the case of *Masonic Protective Association vs. Farrar*, 126 N. E. Rep. (Ind.), 435, a locomotive engineer injured his knee on January 30th, but continued to operate his engine until his total disability therefrom on February 23d, and the Indiana court held that his injury was not "immediately and totally disabling" within the terms of his policy, and did include in its opinion excerpts from the case of *Merrill vs. Travelers' Ins. Co.*, 64 N. W. (Wis.), 1039; *Williams vs. Preferred*, etc. (Ga.), 17 S. E., 982; and *Preferred Accident Insurance Association vs. Jones* 60 (Ill.) App., 106. This Indiana Court adds that many other cases also could be cited in support of its conclusion.

In the Louisiana case of *Feitel vs. Fidelity & Casualty Co. of New York*, 84 S., 491, it is held that "A petition which alleged an injury, on August 28th, from which infection resulted and caused the confinement of petitioner in a hospital beginning from September 10th, without alleging that the disability was immediate or continuous after the injury, and without alleging that it resulted exclusively from the injury, does not entitle insured to recover the benefits provided by the policy for immediate and continuous disability resulting solely from accidental injuries." This Louisiana court also cites the case of *Continental Casualty Company vs. Ogburn* 57 So. (Ala.), 852, wherein it is stated that "It is sufficient to say that the terms 'at once' and 'immediately,' as used in the accident policies in dealing with the nature and character of the disability, have been construed by a majority of the courts as adverbs of time and not of causation, and that they do not mean a reasonable time, but mean presently or without any substantial interval between the accident and the disability."

In *Mullins vs. Masonic Protective Association*, 168 S. W. (Mo.), 843, it was held that "The word 'immediately' should not be said to mean instantaneously, yet it has a meaning applied to time which limits that time, and several days later at one's usual avocation before disability ensues is certainly beyond the limit. The word is introduced to prevent uncertainty as to the cause of the disability. If an interval elapses, some obscure ailment may supervene and produce physical

or mental enfeeblement which will be attributed to the accident and an unjust liability fall on the insurance company. If 8 days passed before the plaintiff was unfit for work or business, he was not immediately disabled within the meaning of the policy."

In the Michigan case of *Hohn vs. Interstate Casualty Company*, cited in a note appearing in 38 L. R. A., page 529-538, an instruction given by the lower court was upheld to the effect that "If the total disability commenced on the 11th and he (the insured) was totally disabled for 5 weeks after that, then he would not be entitled to recover for the reason that there was only a partial disability from the 3d until the 11th," or in other words for the reason that the disability did not immediately within the meaning of the policy follow the accident.

In the case of *Laventhal vs. F. & C. Co. (Cal.)*, 98 Pac., 1075, the insured, on November 10, 1903, bruised his abdomen but thereafter attended to most of his office duties until December 1, 1903, whereupon he retired to his bed for a continuous period of some 27 weeks. The only question raised in this case was whether or not the period after the accident and before the disability of 22 days would prevent a recovery on a policy worded like the one at bar. In substance the California court held that an insurance contract was like all other written contracts in that its terms must be construed in their ordinary sense, and that when the terms are plain and unambiguous it is the duty of courts to hold the parties to their contract; that "the defendant insurance company had the right to make its liability depend upon the fact as to whether or not plaintiff was immediately disabled by the injury from performing any and every kind of duty pertaining to his occupation. It had the right to take the question out of the category of such uncertainties as might be raised by experts, or oral testimony as to whether or not the final total disability was caused by the injury or by other complications or conditions. It made its insurance policy with these conditions, and evidently fixed its rate of premium in accordance with the risk it assumed. To these conditions the plaintiff gave his assent when he accepted the policy. If he was not immediately disabled he can not in law or in morals hold the defendant liable. If where 22 days elapsed before the injury finally overpowered and disabled the plaintiff we should hold that such disability was immediate, the same reasoning would apply if the period had been 50 days, and so on for months and perhaps years. Medical writers have referred to cases where a slight injury received in youth, from which the patient apparently recovered, has been the proximate cause of death in old age." In holding that the insured could not recover under his policy, the California court further states that identically the same provision in accident policies has been frequently construed

by the highest courts of other States, and that the great weight of authority is in favor of the conclusion it reached, citing the case of *Continental Casualty Co. vs. Wade* (Tex.), 105 S. W., 35, and several other authorities, including an excerpt from the Georgia case of *Williams vs. Preferred Mutual Accident Insurance Association*, 17 S. E., 982.

The numerous authorities of which the foregoing cases are a part all support the proposition that the amended complaint at bar is defective in that it clearly appears therefrom that the total disability asserted did not begin until 16 days after plaintiff's injury. If it contained in substance the allegation that either a total or a partial disability to plaintiff resulted immediately or without any substantial interval of time intervening after his accident, then it would not be vulnerable to the objection now being considered. Where the terms of an insurance contract are ambiguous or susceptible of two different meanings, then that meaning should be adopted which is more favorable to the insured than to the insurance company who constructed it. Such a rule, however, can not be invoked to make what is already plain in the contract uncertain, indefinite, or ambiguous. The parties hereto had the right to make the contract in suit, and the court possesses no authority to change it. The terms thereof are to be taken and understood in their ordinary sense. The word "immediately" as used in the contract by the parties hereto refers to the time of plaintiff's disablement. It is clear that the parties intended to limit recovery under the contract to such accidental injuries of the kind sustained as resulted in disability without any substantial interval of time intervening, and to exclude recovery for a disability that did not become effective presently.

Such being the conclusion reached, it follows that the defendant's demurrer, because of the objection summarized in the foregoing third paragraph, should be sustained, and an order to such effect will be entered on the motion docket this 27th day of February, 1923.

STOOMVAART MAATSCHAPPY OCSTZEE, Libellants, *versus*
UNITED STATES, Owner of S. S. "WEST HIMROD."
UNITED STATES *versus* S. S. "WOLSUM."

(District Court, Canal Zone, Balboa Division, February 21, 1923.)

No. 546.

1. ADMIRALTY. COLLISION. LIABILITY.

The *West Himrod* is a vessel owned by the United States. The *Wolsum* is a vessel owned by the libellants, Stoomvaart Maatschappy Ocstzee. At the time of the collision in question the *West Himrod* was approaching the harbor

entrance at Cristobal, Canal Zone, while the *Wolsun* was departing from the harbor. As the *West Himrod* approached the harbor entrance, due to the negligence of its officers it crossed the harbor entrance at an acute angle. The officers of the *Wolsun* observed the fact that a collision was likely to occur some 4 or 5 minutes before it in fact occurred, and in time to have prevented the collision by stopping the *Wolsun* or changing its course. The *Wolsun* was proceeding at a speed in excess of that permitted by regulations for navigating the Panama Canal; its officers did not undertake to stop the *Wolsun* until it was 200 yards distant only from the *West Himrod*. Held, That while the officers of the *West Himrod* were negligent, the act of the officers of the *Wolsun* in proceeding at an unlawful rate of speed and failing to stop the *Wolsun* or change its course after the risk of collision became apparent to them was also negligence, and the combined negligence of the two was the cause of the collision.

2. COLLISION. NEGLIGENCE OF BOTH VESSELS. DAMAGES.

The doctrine of an equal division of damages in collision cases between two vessels where both are negligent is applied to this case.

Proctors for United States and *West Himrod*, A. C. Hindman and J. J. McGuigan.

Proctors for *Wolsun*, Harmodio Arias and Felix E. Porter.

WALLINGFORD, District Judge. On April 6, 1922, the libellant in the above case numbered 546 (hereinafter called either "*Wolsun*" or "libellant") instituted its libel against the respondent in said action (hereinafter referred to as "*West Himrod*" or "respondent") for \$60,000 damages claimed to have been sustained by it as a result of a collision between the said two steamships. On the following day the *West Himrod* in a separate action, numbered 547, commenced its libel against the *Wolsun* for \$30,000 damages which it alleges it suffered in the same accident. Thereafter the latter case was consolidated with the first one, numbered 546, for final determination as one consolidated action.

The collision resulting in this consolidated suit occurred on April 2, 1922, at approximately 7.05 o'clock in the evening. Such was the hour indicated by the *West Himrod*'s clock, and the master of the *Wolsun* testified that his ship's clock, which was 15 minutes slower than local time, recorded 6.50 p. m. as the hour of the impact. On this particular evening the surface of the waters was not rough, and the visibility was good.

The two parties hereto stipulated in the record "that the actual collision took place on a line drawn from the east to the west breakwater at a point between the center of the channel and the east breakwater on the right half of the channel." From the evidence it may be concluded that at the moment of impact the two steamers were nearer to the east breakwater than to the channel's center. The entrance to these breakwaters that protect the Cristobal Harbor is

700 yards in width, and is north of and 4,100 yards from the end of the Cristobal Mole near Pier 6.

The *West Himrod* is a somewhat larger vessel than the *Wolsum*. The latter is a Holland steel vessel, and on April 2d, 1922, was laden with a cargo of lumber and bound on a voyage to South Africa. The former, under the Act of Congress of June 15, 1920, is a steamer of the United States, and at the time in question was loaded with 6,300 tons, approximately, of sugar, bound for Vancouver, B. C., from a Cuban port. In approaching each other the *Wolsum* was proceeding in a northerly direction out of the Colon-Cristobal Harbor toward the Carribbean Sea, and the *West Himrod* was proceeding in a generally southeastern course until opposite the entrance between the breakwaters, at which place it intended to assume a generally southern course between the breakwaters into the said Colon-Cristobal Harbor. This harbor itself is formed and protected by the breakwaters which separate the Carribbean Sea and Limon Bay. From 6.10 o'clock, p. m., when the *Wolsum* passed the end of the Cristobal Mole, the mast and side lights of each steamship were burning brightly, as were the lights on the ends of the breakwater and as were the buoy lights in the harbor and the many ones on shore. Neither the master nor any other officer of the *Wolsum* having anything to do with the ship's navigation had ever been in the Canal Zone waters prior to the one trip referred to in this proceeding. The master of the *West Himrod* on four prior occasions had passed through the Canal and Cristobal Harbor from the Pacific to the Atlantic, and had one former experience in navigating the same route in an opposite direction except that he then approached the entrance to the Cristobal Harbor from the east instead of from the northwest.

It is claimed in substance by libellant that the *West Himrod* at the time and place in question was negligently navigated, and that such negligence was the direct and proximate cause of the collision and the damages sustained by it. Some of the specifications set forth and urged by said libellant as amounting to a display of poor seamanship on the part of the *West Himrod* are:

1st. That it approached the Cristobal entrance of the harbor at an excessive rate of speed.

2d. That its operation and maneuvering from the time of approaching near to the harbor's entrance until the collision occurred were improper and unskillful.

3d. That it attempted to cross the line between the ends of the two breakwaters at too acute an angle.

4th. That it was on the wrong and east half of the entrance channel when and where the collision took place.

5th. That it did not comply with its own signals as to its course.

All of the testimony is now in typewritten form. No occasion consequently exists for setting out now any detailed statement of facts.

Reference therefore will be made herein only to parts of the record as occasion may suggest as lending support to the conclusions herein reached, without attempting to detail all of the evidence in the record for and against same.

As to the precise time of the sounding of each ship's signals, as to the then exact positions of the two steamers, and as to the then distances from each other and from the entrance between the breakwaters are matters concerning which the record displays some lack of accuracy and harmony. However, without now considering any of the evidence offered in support of whether the *Wolsum* was or was not negligent in any particular respecting its navigation on the occasion in question, the following does appear from the record:

According to the testimony of Henry Lague, Quartermaster of the *West Himrod*, the *West Himrod* was 12 or 15 miles from the breakwater entrance at the time he stationed himself on its bridge at about 6.25 or 6.30 p. m. Either this estimate is wrong or in proceeding 12 miles in some 40 minutes the *West Himrod* was driven in its approach to the breakwater entrance at a rate of speed of 18 miles per hour. This quartermaster stated that when he assumed his position on the bridge at not later than 6.30 p. m. he could see a long ways ahead. Arthur Ahrens, second officer of the *West Himrod* who had made five trips previously through the Canal and Cristobal Harbor from the Pacific to the Atlantic, took his position on the bridge at 6.45 p. m. at which time he states that the said steamer was about 3 miles outside of the breakwater, and that he then saw the lights on the two respective ends of the said breakwaters. These breakwater lights are about 4,100 yards from said pier 6 and are some 1,600 yards from the lights on the two outer harbor buoys. Neither the master nor any other officer of the *West Himrod* excepting the said second officer presented any testimony as to the time that they observed and distinguished the two breakwater lights from the other lights farther in and in front of them. Its master stated that at 6.50 p. m., his ship's time, his ship according to his recollection was about 1 mile outside of the breakwater. Testimony as to the length of the course covered within any stated time necessarily is more or less speculative and consequently unreliable. There is no testimony as to any lessening of speed on the part of the *West Himrod* in its course across the Carribbean Sea until 6.59 p. m. at which hour the master states that he gave an order of "half speed." This is the first order set forth in the record up until 6.59 p. m. as to the rate of speed. In the opinion of its master, the *West Himrod* was about 150 yards from the red light on the west breakwater at 6.59 p. m. when he gave his orders of "half speed" and of "hard aport," thereby intending to swing around the end of the western breakwater on a sharp curve toward the entrance to the harbor. One minute thereafter, according to his own

ship's time, all of the officers including the Master of the *West Himrod* had their attention first attracted to the approaching *Wolsum* which had blown its first signal of one blast, and at which time the master of the *Wolsum* estimated the distance between the two vessels as about one half to three quarters of a mile.

The situation that confronted the master of the *West Himrod* as he approached the harbor's entrance is shown quite clearly by the record. In front on the breakwaters some 4,100 yards from shore were the red and white breakwater lights, also beyond were the lights on the buoys in the harbor channel and beyond them were the many lights throughout the Cristobal Coaling Station and near the shore line opposite the harbor's entrance. They all appeared to an untrained or careless vision to be merged and indistinguishable from each other or from those on anchored or moving vessels, and they so appeared to the eye of the *West Himrod* master. The harbor itself during the early part of the evening was or should have been known to the master to be a busy fairway along which water craft of various designs reasonably might be expected to be moving. The velocity of the wind from the north according to his then belief was about 18 to 20 miles per hour which velocity was definitely fixed by Meteorologist Chappel. The latter testified that the electric automatic recorder of wind velocity and wind direction stationed and maintained at the time by the Government in the near vicinity of the collision showed the velocity of the wind from the north, which shifted occasionally to the northeast, was from 16 to 22 miles per hour between 6 and 8 o'clock on the evening in question, or an average velocity of about 18 miles per hour. The natural effect of a wind of such force on the *West Himrod* in the position it was in respect thereto and its effect on the course thereof and on the current were or ought at the time to have been known by its captain. He knew or should have known the then movement or condition of the tide and of the currents there affecting or which might affect his ship's course and he knew or should have known all of the data set forth on the charts of the harbor in his possession respecting distances and conditions in and approaching the Cristobal Harbor. In addition, he had whatever advantage there may have been in having made previously one entrance into and five exits from this same harbor. If he retained no benefit from those former visits, then his approach in the instant case should have been in the exercise, if possible, of increased caution. The record as made by the respondent's own witnesses shows that the conduct of the master of the *West Himrod* in navigating his vessel toward and into the entrance of a harbor with which he was unfamiliar could be likened unto that of an autoist who drives his machine along a city's business thoroughfare with the same assurance as along an unrestricted country road, or of an inland mariner who rounds a screened bend on an initial trip with

the same confidence as he would follow a straight course with which he was familiar, or of a seagoing captain who on an excessively foggy day presumes to make his unseen way through strange harbor waters with the same faith that he would navigate his ship toward its own home dock.

The rule applicable to a steamer entering the Cristobal Harbor at night is to the effect that, when a vessel has picked up and has brought in range the Gatun lights on shore to the south, it shall proceed at slow or half speed half way between the two end breakwater lights while keeping the Gatun lights in range. In other words it should enter no nearer to the end of the west breakwater than some 350 yards. (H. O. No. 130 Central America and Mexico Pilot, East Coast, Second Edition, page 99). The record convinces one that the *West Himrod* failed to follow such regulation. This rule does not contemplate a vessel attempting at night to enter the harbor at an excessively oblique angle, but does contemplate that a master of a ship should so maneuver it in its approach as to enter the harbor approximately at right angles to a line drawn between the two breakwater lights and at about its center. Had such a maneuver been made on the part of the master of the *West Himrod* he would have had the benefit of the velocity of the wind against the back of the ship rather than on its port side. Prudence also would dictate that a master of a ship unfamiliar with the surrounding conditions should approach and make the harbor entrance at half speed or even at a less rate. Had reasonable caution been exercised on the part of the master of the *West Himrod* in one or more of said respects indicated, it follows that the collision would not have happened regardless of whether the approaching vessel was itself negligent or otherwise.

If second officer Ahrens first could observe and distinguish the lights on the two respective ends of the breakwaters at 6.45 p. m. and at a distance of about 3 miles outside the harbor entrance, it is reasonable to conclude that such an observation could have been made by the master and other officers on watch aboard the *West Himrod*. The natural result of a closer scrutiny shoreward, aided by the use of suitable ship glasses, which were or should have been on board, and assisted by a closer inspection of the harbor chart in their possession, doubtless would have been that a clearer vision would have been presented showing among other things the illuminated and approaching *Wolsum*. At least the *West Himrod's* approach toward the entrance into the harbor should have been at such a retarded rate of speed as to afford its master ample time and opportunity to fully advise himself as to the situation and surroundings then and there existing.

The master of the *West Himrod* also testified that at 7 o'clock p. m., he issued the order to stop, which was given at the same time that the *Wolsum* blew its first signal of one blast and which latter signal

was promptly answered by his ship with one blast; that at 7.01 p. m., he gave the order of "full astern" at which time his vessel gave a signal of three whistles and that no answer thereto came from the *Wolsum*; that at 7.01½ he gave another order to stop; that at 7.03 p. m., he gave the order of "full astern" immediately followed by the second signal of the *West Himrod* of three blasts, which three blasts were answered by the *Wolsum* within 20 to 30 seconds by one blast and which latter signal of the *West Himrod* was promptly succeeded by its third signal of three blasts to which no answer was given by the *Wolsum*; and that at 7.05 p. m. the ships came together while the engines of the *West Himrod* had been going full astern continuously for the preceding 2 minutes.

As to what signals were exchanged, the master of the *West Himrod*, its second officer, Arthur Ahrens, its quartermaster, Johnson, its quartermaster, Lague and its boatswain, Fyhn, all agree that the *Wolsum* gave one blast which the *West Himrod* answered with one blast, that the next signal was three blasts from the *West Himrod* which received no answering blast from the *Wolsum*, and that the *West Himrod* then gave its second signal of three blasts which the *Wolsum* answered with one blast. The *West Himrod's* master, its quartermaster, Johnson, and its boatswain, Fyhn, in addition, stated that, after the *Wolsum* gave its second one blast in answer to the *West Himrod's* second signal of three blasts, the *West Himrod* gave a third signal of three blasts which remained unanswered by the approaching steamer. The conclusion on this matter from a consideration of the entire record is that the *West Himrod* sounded her signals in their order as above outlined by her officers. Their testimony is accepted in said particular as they were in much better position to know concerning same than were those on board the *Wolsum* and no persuasive reason presents itself to their discredit. (The *Ozark* 281 Fed., 281).

A reading of respondent's own testimony as outlined in the last two preceding paragraphs as to the giving and the time of giving of signals and as to the then movements of its ship and orders respecting same furnishes sufficient support for the *Wolsum's* claim of negligence against the inbound steamer. Its captain is in no position to assert otherwise. During the 6 minutes between 6.59 p. m. and 7.05 p. m. he issued orders the effect of which aided by the wind and ocean currents was to land his steamer not lengthwise but crosswise of the mouth of the harbor with the west breakwater light behind it and with its bow pointed in the general direction of the east breakwater. He placed the failure of his ship to respond properly to its rudder and engines incidentally to the effect of the wind but mainly to the effect of the charted current and to an uncharted current just outside of the channel entrance. The existence of any such cross current there at

that time is not clearly established. Be that as it may, the fact remains that any unexpected effect of currents affords no benefit to respondent. If its master, who testified that his ship's failure to respond promptly to its rudder and engines "was due to the peculiar set of currents I got there, of which I knew nothing," had obeyed the aforesaid rule as to the path of approach and entrance into the harbor, and if he had sooner controlled his ship's speed and had taken due opportunity to more closely scrutinize the situation ahead of him there would not have been any thwarting currents upon which to place the blame. Having negligently placed his ship in a situation where it became more difficult to handle, the effect of that negligence on the part of the *West Himrod* continued directly and without interruption until its impact with the *Wolsum*. The testimony of the *West Himrod*'s captain sets forth that he ordered the engines thereof to revolve at half speed at 6.59 p. m., ship's time, which order immediately was followed by one of "full ahead again." At 7.00 p. m. his order of "stop" was given, followed at 7.01 p. m. by one of "full astern," then at 7.01½ p. m. by one of "stop" and then at 7.03 p. m. by one of "full astern." There is far from a convincing showing made that the *West Himrod* did not have sufficient sea room to have changed its course hard to its port side at 7 p. m. when the *Wolsum*'s first blast was heard and at full speed rounded its way of the course being pursued by the approaching steamer instead of stopping its engines and then a minute afterwards putting them in reverse. At any rate it does appear that the *West Himrod* just at 7.00 p. m., when its engines were ordered stopped, was going "full ahead again" and it is a natural conclusion that, had such a speed been reduced to half speed for just a few minutes or had the engines been maintained even at full speed it would not have been affected seriously by any current and it would have passed the other steamship port to port.

That its master failed to navigate his ship efficiently and that it was carelessly handled until the accident happened seems to be too certain to occasion extended comment. On the record as made, the conclusion is that the *West Himrod* was negligent as charged.

In its libel case No. 547 against the *Wolsum* and consolidated with case No. 546, the *West Himrod* makes the following charges of negligence among others, viz.:

1st. That the steamer *Wolsum* on her outgoing course across the harbor at a rate of 7 miles per hour was negligent in not checking her speed in time to avoid the collision that did occur.

2d. That the *Wolsum* was negligent on said occasion in not changing its course in time to avoid said collision.

Before considering the two foregoing charges of negligence it may be suggested that the contention of the *West Himrod* of negligence on the part of the *Wolsum* in not responding to some of the signals of the *West Himrod* is not well taken for the reason that the failure of

the master of the *West Himrod* to control the movements of his ship after getting it somewhat crosswise of the channel rendered the failure of the *Wolsum* to answer the signals of the *West Himrod* an immaterial omission. If the *Wolsum* on its continued course had responded to each signal heard, without any lessening of speed or changing of course, the collision nevertheless would have ensued.

It also may be said that the act of the *Wolsum* in crossing the harbor along the center of the dredged channel of 175 yards in width until just after passing the outer buoys located 1,600 yards from the entrance to the breakwater can not be deemed negligence inducing the collision, neither can complaint be lodged against it successfully for having at about said point permitted the Canal Zone pilot to disembark. Such a course across the channel and the departure of the Canal Zone pilot at or near the outer buoys are in harmony in the absence of unusual circumstances with the prevailing custom in such waters. Thereafter there still remained time for the master of the *Wolsum* to have controlled its movements in reference to those of the *West Himrod* he saw ahead of him.

The master of the *Wolsum* in navigating his steamer toward the entrance to the harbor did labor under the rule of caution that, after observing the existing danger of a collision with an approaching vessel, he must use the required care necessary to avoid such a result. His failure so to do would amount to negligence if such failure contributed to a collision, even though the vessel approaching also in the first instance was being negligently navigated. He also was bound by the terms of rule 69 of the "Rules and Regulations for the Operation and Navigation of The Panama Canal" which in substance provides that, if the courses of two ships approaching each other be converging and their bearing does not change appreciably, the risk of a collision should be deemed to exist. The violation of this rule No. 69, provided such violation was the proximate cause of or contributed to the accident, also would constitute negligence. In crossing the said harbor he also was charged with the knowledge of the provisions of section 101 of the said "Rules and Regulations for the Operation and Navigation of The Panama Canal," which provides that the speed of a vessel on entering or leaving a port at either terminus of the Panama Canal shall not exceed 6 knots per hour. An infraction of this requirement which contributes to a resulting injury to another ship likewise would constitute negligence on the part of the vessel so offending.

Following the departure of the *Wolsum* on its northerly course along the center of the harbor channel from its dock at Cristobal and when the distance between it and the breakwater entrance was about 4,000 yards or 2.27 miles, its master first observed the *West Himrod* some 2 or 3 miles out at sea, with its two mast lights burning, approaching

the 700-yard entrance between the breakwaters on an easterly course or southeasterly. Upon arriving in the channel center, some 1,500 yards or .85 mile from the breakwater, the *Wolsum* blew one short blast, indicative of a change in its direction to its right or starboard. Accordingly it did so change its course one point or $11\frac{1}{4}$ degrees. This one signal of libellant was answered by respondent with one short blast. Observing no change in the *West Himrod's* course, the *Wolsum* gave a second signal of one blast. The approximate distance between the two vessels while exchanging the foregoing single-blast signals was from one half to three quarters of a mile. At this time the *West Himrod* was nearing the end of the west breakwater. The time of the giving of the first signal of the *Wolsum* was 7 p. m., approximately. The collision occurred at 7.05 p. m. There is a conflict in the testimony relative to the character of the signals subsequently exchanged. The testimony, however, does clearly show that almost immediately following the one blast of the *West Himrod* in response to the first blast given by the *Wolsum* the *West Himrod* did give a signal of three short blasts indicating that it was putting its engine full astern and that it could not proceed along the course indicated by its former responsive signal of one blast. The master of the *Wolsum* states that when this signal of three blasts was given his distance from the *West Himrod* was too great for him to see if its engines in fact were reversed but he testified that he did observe that the *West Himrod*, notwithstanding the giving of the three-blast signal, did continue to go ahead. The *Wolsum* did not slacken its speed on its changed course of one point or $11\frac{1}{4}$ degrees but continued its rate of speed of 7 knots per hour and its master contented himself by giving one blast in response to the signal of the *West Himrod* of three blasts, thereby indicating that the *Wolsum* would continue going to starboard. The master of the *Wolsum* states that about 1 minute prior to the collision he did put the engines of the *Wolsum* full astern in an attempt to avoid a collision. The said master also testified that he heard the *West Himrod* the second time give a signal of three blasts and that about 4 or 5 minutes elapsed between the *Wolsum's* short blast and this second signal of three blasts which he states were given by the *West Himrod*. In another place in his testimony the said officer in charge of the *Wolsum* stated that about 1 minute elapsed between the *West Himrod's* last signal of three short blasts and the time of the collision and that though "hard to tell the distance" the *Wolsum* was about 200 yards from the *West Himrod* when the former put its engines full astern. The *Wolsum* is 360 feet long and its master expressed the opinion that when traveling at a rate of 7 knots per hour it could be stopped in about three ship lengths by putting its engines full astern, or in about a distance of 1,080 feet. Therefore, according to the said master's testimony alone he permitted

his vessel to proceed on a course at a rate of speed of 7 miles per hour toward a vessel in its path which was not complying with its own signals until a point was reached about 200 yards therefrom, when he made, without having attempted to change his course, his first effort to check the speed of his vessel by reversing its engines when he knew at the time that he was proceeding at a rate of speed which precluded the *Wolsum* from stopping until it had gone about three ship lengths, or 1,080 feet, or 360 yards, which momentum necessarily would cause his ship to strike any obstruction ahead of it only 200 yards distant.

A reading of the testimony leads to the conviction that the officers in charge of the navigation of the *Wolsum* fully appreciated the fact that the *West Himrod* was not complying with its own signals but was continuing to slowly advance through mismanagement, or inability to prevent or because of some other reason unknown to them along a course crossing the harbor entrance, which necessarily would place it within the course of the *Wolsum*. The dictates of ordinary caution, to say nothing of the exercise of a high degree of caution, certainly made it incumbent upon the *Wolsum* in such a situation to sooner check its speed or to modify or again change its course.

The foregoing testimony of the master of the *Wolsum* is not weakened or explained away by any other portion of the record. Therefore it is deemed unnecessary to resort to any detailed review of the evidence respecting the signals given and heard and the distances between the two vessels at different points and their different relative positions during their approach to each other. If the master of the *Wolsum* who for a period of about 5 minutes realized that the *West Himrod* was not complying with its signal of three blasts but in fact was continuing to progress on a course that was rapidly converging with that of his own, had reversed his engines or again changed his course, the collision would not have occurred. In fact during a period of 4 minutes if he had so done, the result that did ensue would have been avoided. However, he did nothing in the premises until approximately a minute before the collision, but he continued to drive his ship until said time and in a danger zone along the course indicated by his two signals of one blast each as if he knew he were immune from danger and as if he intended to exercise what he deemed to be his right of way.

The courts have frequently commented upon similar situations, and it has been held that "risk of collision does not necessarily mean immediate danger, but it means chance, peril, hazard or a danger of collision, as distinguished from immediate danger." As stated in 11 C. J., 1018, in comment on the cases there cited respecting the distinction between the risk of collision and a certainty of collision, "Admiralty rules require efforts to avoid not merely the certainty of collision but the risk of it, and place on the ship that has the right

of way the duty to slacken or stop in order to avoid collision when the risk of collision arose and not merely when it would otherwise be certain."

It is true that the *West Himrod* at the moment of impact was on the wrong and east side of the channel, but as stated in substance in the case of the *Brittania* 34 Fed., 557, it is bad navigation on the part of a vessel while it has the right side of the course and having ample time and space so to do, refrains from avoiding a collision with an approaching vessel ahead of it which is on its wrong side of the course. As pointed out in respondent's brief, it was a situation similar to the one at bar that caused the court in the case of the *New York*, 175 U. S., 187, to remark that "the lesson that steam vessels must stop their engines in the presence of danger, or even anticipated danger, is a hard one to learn, but the failure to do so has been the cause of condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect." It also is clear that if the *Wolsum* had adhered to the rule to proceed through the harbor no faster than at the legal rate of 6 knots per hour she would not have arrived at the place of impact with the *West Himrod* until after the latter had righted her course and had proceeded in safety. The record is definite enough that the progress of the *Wolsum* up until 1 minute preceding the collision was no less than 7 miles per hour. As stated in substance in the text 11 C. J., 1159, a vessel violating a prescribed speed regulation is liable if such violation contributed to cause a collision.

The case of the *Kentucky*, 148 Fed., 500, was one in which the *Kentucky* collided in a fog with another vessel ahead of her which was practically stopped and was lying across and partially blocking the wrong side of the channel. The *Kentucky* was proceeding at a rate of speed of about 5 knots per hour at the time but the court held that it was bound to have maintained a speed at such times that would permit her to be stopped on sighting another vessel in her course even though such other vessel may also have been guilty of negligence in being where it was struck.

In the case of *Southern Railway, et al., vs. U. S.*, 45 Ct. of Claims Reports, 322, it is said that the reason for a rule limiting the rate of speed in Norfolk harbor was to hold vessels to a speed that could be overcome in case of finding another vessel in the way.

Even though the testimony shows that the collision would not have occurred at the point where it did occur had the *Wolsum*, upon leaving the Cristobal dock, not exceeded a rate of 6 knots per hour, as prescribed by the rules, it does show in addition that the coming together of the two vessels would not have happened if the *Wolsum* during the 4 minutes following the sounding of its first signal of one blast had either again changed its course or had checked or stopped its

onward progress. It was not the failure of the master of the *Wolsum* to timely see that the approaching steamer was not complying with its own signals as to reversing, but his imprudent navigation after observation that contributed to produce the accident. As the *Wolsum* was guilty of a breach of an imperative and applicable rule as to rate of speed, she has not sustained the burden of showing, not merely that her said fault might not have been one of the causes or that it probably was not, but that it could not have been one of the causes of the collision. *The Providence*, 282 Fed., 658; *Lie vs San Francisco, etc., Co.*, 243 U. S., 291 or 61 L. Ed., 726; the *Beaver* 219 Fed., 134.

In not changing its course so as to avoid the *West Himrod* which was not complying with its own signals but was continuing to slowly advance across its course, the *Wolsum* was negligent and the same charge properly may be laid against it in that it continued to advance at its unslackened speed of 7 miles per hour toward the *West Himrod* until too late to successfully check its speed or to stop. The conclusion therefore is that the charges of negligence against the *Wolsum* have been substantiated by the evidence.

Having found both parties hereto negligent in the premises, there remains for consideration the question of damages. The doctrine of an equal division of damages in collision cases between two vessels, where both are culpable, is required to be applied in this instance. Section 191 Spencer on Marine Collisions, Ed. 1895; *The War Pointer*, 277 Fed., 718; *The Walter D. Noyes*, 275 Fed., 690; the *Nevada*, 275 Fed., 965. Consequently both parties hereto should be charged equally with one half of the total resulting loss sustained jointly by them.

Owing to the nature of a large part of the testimony, it is difficult if not impossible to make a mathematically exact award in the case at bar. For injuries to two vessels resulting from their collision for which both are at fault, all the damages sustained should be assessed and equally divided between them if their respective values and freight are of sufficient value so to do. As stated in the *Mascot*, 282 Fed., 766 "The wrongful act and the measure of the indemnity are not limited by contract, but are coextensive with the damages, including damages for detention of the vessels during the time necessary to make repairs and fit the vessel to resume her work," citing *Williamson, et al., vs. Barrett* 54 U. S. (13 How.), 101, or 14 L. Ed., 68; the *Baltimore*, 75 U. S., 377 or 19 L. Ed., 463; and the *Conqueror*, 166 U. S., 177 or 41 L. Ed., 937. In considering the amount of damages to be assessed in such cases, the burden of proof rests upon the claimant in each instance to establish any award in its favor. If the claim as to any item is clothed with substantial doubt and is perplexingly indefinite, it necessarily should be disallowed.

In any judicial hearing here in the Canal Zone involving the reasonable market value of any services rendered or materials furnished in connection with the repair of a damaged vessel the situation is unlike that generally prevailing elsewhere within the jurisdiction of our courts. Here the two harbors and Canal are under the management of The Panama Canal and the latter alone and without competition is the only local agency equipped for rendering such service. In this instance the *Wolsum* as a condition precedent deposited with The Panama Canal the required amount of cash funds before any repair work was started. The cash in settlement of bills incurred of any nature was paid out of said sum deposited upon approved bills some of which were and some were not itemized so as to be self-explanatory. On the hearing herein no objection to any *Wolsum* expense bill was interposed by proctors for the Government because of its amount or lack of a showing of reasonable market value, but in some instances objections by them were made on the basis that there was no connection between claims made and the accident, or that there were unnecessary charges made which had no direct connection with the accident.

With the foregoing outlined situation in mind and in harmony with what appears to be justifiable under all the circumstances, the damages sustained by the *Wolsum* directly growing out of said collision are fixed in the sum of \$36,290.99. As a result of the accident its bow was stoven in, its stem broken, its decks broken on its port side and its starboard side below the water line was damaged by coming in contact with the east breakwater. Some of the steel plates were repaired and others were replaced by new ones. The vessel was in dry dock about 11 days. Following is an itemized statement of the items entering into the said sum of \$36,290.99:

ALLOWED

Item No.	Amount.	Exhibit.	Remarks.
1	\$237.00	D	Services of 2 tugs, 8 canal seamen after accident, and pilotage.
2	37.35	E	1 doz. Mazda globes.
3	7,746.85	F	For stevedoring about $\frac{3}{4}$ of cargo on April 5.
4	65.75	G	For tug and launch hire from cargo pier to dry dock.
5	35.00	K	Service of tug from dock 8 to dock 18.
6	1,996.61	L	Stevedoring about $\frac{3}{4}$ of cargo.
7	140.00	P	Diver and outfit examining <i>Wolsum</i> .
8	472.02	Q	Overhauling <i>Wolsum's</i> machinery in April.
9	15,391.65	R	Repairs on <i>Wolsum</i> hull.
10	256.96	S	Windlass repairs.
11	6,503.25	T	Repairs, dock and undock in April.
12	1,365.00	V	For tug, launch, wharfage and pilotage.
13	70.00	X	Tug service May 7th and 8th.
14	30.00	AA	Preliminary surveys of <i>Wolsum</i> on April 2 and 3.
15	589.80	FF	<i>Wolsum's</i> supplies of paints and oils damaged.
16	30.00	JJ	Translating testimony at hearing before Notary Sheibley in court house on May 6, 1922.
17	50.15	PP	Fee of Notary Sheibley in taking testimony of witnesses on hearing.
18	1,048.60	RR	Oil consumed for fuel and lubrication.
19	225.00	OO	Additional services for surveyor by Lloyd's Agency.

\$36,290.99, total amount allowed.

The total amount as damages presented on behalf of the *Wolsum* in the first instance was the sum of \$52,024.32. During the hearing from said total sum there was withdrawn from consideration the following three items, aggregating \$3,117, viz.: Item 5 on Exhibit "A" for tolls, \$2,847; item 54 on Exhibit "A" for photographs of *West Himrod* for *Wolsum* \$12; and item 4 on Exhibit "RR" for primage claim of *Wolsum's* Captain, \$258. This reduction of \$3,117 from the original claim of \$52,024.32 leaves a remainder of \$48,907.32 from which should be subtracted the allowed claims aggregating \$36,290.99. The net amount remaining after such subtraction represents the disallowed claims of the total sum of \$12,616.33 itemized as follows, viz.:

DISALLOWED

Item No.	Amount.	Exhibit.	Remarks.
1	\$15.00	B	Launch service of two trips to <i>Wolsum</i> by its local agent, at \$5 per hour.
2	5.00	C	Launch service one trip.
3	49.00	D	5 trips on launch by <i>Wolsum</i> master during 3 days.
4	35.00	H	Duplicate charge on tug to dry dock.
5	197.68	I	Services of canal employees April 9th for overtime.
6	19.00	J	Water supplied to <i>Wolsum</i> crew April 15-23.
7	60.00	M	Duplicate services of tug on April 23 from dry dock to dock 18.
8	14.85	N	For time of idle employees on April 25th.
9	17.65	O	Time of idle employees on April 22d.
10	131.04	U	Overtime of employees.
11	220.20	W	For light rentals and current.
12	15.00	BB	Duplicate preliminary inspection of <i>Wolsum</i> .
13	9.00	CC	Photographing damaged parts of <i>Wolsum</i> at request of its agent.
14	25.00	DD	Another duplicate preliminary inspection and estimate of damages.
15	7.00	EE	Agent's launch used by him on visit to <i>Wolsum</i> .
16	410.00	GG	<i>Wolsum's</i> agent's fee and use of agent's car for 32 days.
17	.50	HH	Charge of train baggageman for carrying letter on train from agent containing deposit check to release <i>Wolsum</i> .
18	127.50	II	Watchman's services on <i>Wolsum</i> .
19	.50	KK	Freight on <i>Wolsum's</i> records from Cristobal to agent's office in Panama.
20	100.00	LL	Agent of <i>Wolsum's</i> fee.
21	6.00	MM	Consul's fee for authenticating written report of master of <i>Wolsum</i> to his ship owner concerning collision.
22	21.00	NN	Agent's launch at Cristobal used to visit <i>Wolsum</i> .
23	175.00	QQ	Survey and report of <i>Wolsum's</i> damage by its agent.
24	7,840.00	RR	Demurrage April 2 to May 7—35 days.
25	90.00	RR	<i>Wolsum</i> captain's claimed daily allowance.
26	495.45	RR	Overtime for <i>Wolsum</i> deckhands, firemen, donkeymen and officers.
27	450.45	RR	Remaining sundry 11 items on said exhibit.
28	328.72	A	Overtime of <i>Wolsum</i> crew at Balboa.
29	119.57	A	9 items for commissary supplies.
30	46.00	A	4 items for medical and hospital services.
31	1,352.00	A	Interest claimed on <i>Wolsum</i> cash bond of \$31,000 from May 6, 1922, to Oct. 30, 1922.
32	170.22	SS	Sundry cablegrams from <i>Wolsum's</i> captain to various foreign stations.
33	63.00	Z	14 bills for water supplied and garbage disposal April and May, 1922.

\$12,616.33, total amount disallowed.

RECAPITULATION.

\$36,290.99 allowed.

3,117.00 withdrawn.

12,616.33 disallowed.

52,024.32 total amount of original claim.

In reference to all of the 33 disregarded items it may be said that the record demonstrates either an absence of all proof or a showing of such a nebulous character as amounts to excessive uncertainty. In many instances the only witness who even made reference to said ex-

pense items was witness Darlington, who on the stand conceded that he was testifying mainly from hearsay. It is the duty of the injured party to use diligence to reduce and not to increase the damages expected to be paid by the party in fault. An inspection of the claims made in this instance by the *Wolsum* for damages sought to be derived from the owner of the *West Himrod*, especially those claims listed above as disallowed, indicates that this duty in many instances at least was not observed by the *Wolsum* to such an extent as to render applicable the comments as to deodands set forth in the case of the *Mascot*, 282 Fed., 766. No sufficient showing was made by direct testimony as to the connection between the foregoing discarded items and the accident, and whatever was testified concerning same was more or less an assumption on the part of the witness without stating any facts upon which be based his assumption.

By way of explanation of Exhibit "D" appearing above in the foregoing allowed and disallowed columns, it may be stated that the total amount thereof is \$286, of which sum \$49 is for launch service on three different days on the part of the master of the *Wolsum* without any explanation in the record as to the necessity or connection of such launch service with the results of the collision and without suggesting any reason why he did not use his own seamen and a small boat of his own ship for his own transportation. Consequently the item has been disallowed and the remainder for the service of eight Canal seamen, two tugs and pilotage has been allowed.

The Exhibit "RR" represents a total demand of \$10,182.50, of which amount \$1,048.60 only has been allowed. The items that have been allowed are as follows:

Item 2, Exhibit "RR," \$924.60. Testified to as value of 120 tons of fuel oil at \$1.15 per barrel, used by *Wolsum* to furnish steam for working winches to discharge and reload about three-fourths of lumber cargo, and for bringing *Wolsum* after injury from Cristobal to Balboa and return.

Item 9, Exhibit "RR", \$57 for 60 gallons engine oil.¹

Item 10, Exhibit "RR," \$7 for 10 gallons cylinder oil.¹

Item 11, Exhibit "RR," \$60 for 50 gallons petroleum oil.¹

Total \$1,048.60.

On this "RR" exhibit appears an item of \$258 as captain's primage which was withdrawn, also the demurrage claim of \$7,840 and 15 other items aggregating \$1,035.90. This division of the items on said "RR" exhibit are summarized as follows:

\$1,048.60 allowed.

7,840.00 demurrage, disallowed.

1,035.90 disallowed, consisting of 15 sundry items.

258.00 withdrawn by libellant.

10,182.50 total amount of Exhibit "RR."

\$10,182.50 total amount of Exhibit "RR".

¹ Incident to unloading and loading cargo.

In reference to the disallowed demurrage item of \$7,840, there is no proof in the record to sustain it. The charter party, Exhibit "TT," offered in evidence, provides that for each and every day's detention of the *Wolsum* on account of any default on the part of the owners of the cargo the latter shall pay to the *Wolsum* £50 sterling per day and that the *Wolsum* is to allow the cargo owners a bonus of £20 sterling per day for all time saved in loading the vessel. The record contains nothing respecting any loss on the *Wolsum's* part by its delay in Canal waters from April 2 to May 7, 1922. No testimony was submitted concerning average earnings or value of the use of the *Wolsum* or of the loss of probable net profits because of its detention for 31 days. The record merely shows the presentation of a claim for \$7,840 for delay for the said period of 31 days and the presentation of the said Exhibit "TT." Consequently the demurrage claim should fail for lack of proof.

In the case cited by libellant of the *Cauyga*, 81 U. S., 270 (14 Wal.), demurrage was held rightfully given to the incapacitated ferryboat injured by tortuous collision at the rate testified to by the superintendents of three principal ferries who assigned their reasons and presented their estimates as to what the value was of the service of the damaged ferryboat.

In the cited case of the *Providence*, 98 Fed., 133, it in substance is held that damages may be computed on a basis of average earnings where no testimony is offered as to the chartered value or where the owner has another vessel to replace the one injured. In this cited case, witnesses however were produced and did testify respecting the value of the use of the disabled vessel.

Also in the case of the *Mary Steele*, 16 Fed. Cases, No. 9226, cited by counsel for libellant in support of the demurrage claim, it is stated that where no testimony is offered as to the value of the reasonable use or market price of a fishing boat tortuously injured, testimony will be received as to the probable net profits lost during its disablement. Such was the holding also in the *Potomac*, 105 U. S., 630, while in the *Conqueror*, 166 U. S., page 110, it was held that demurrage in that case was a proper element of damages but that said element could only be considered when the net profits either have been actually lost or may be reasonably supposed to have been lost, and their amount is proven with reasonable certainty.

The difference between these foregoing cited cases as well as any others that might be cited on the same proposition of demurrage and the case at bar is that in the latter instance there has been presented no proof of any character warranting a demurrage assessment to be made.

Lastly, in respect to the item of \$1,352 on Exhibit "A," there is no showing in the record for this allowance. It is not directly referred

to in the libel filed. In libellant's brief it is stated that it is for interest on the \$31,000 cash bond from May 6, 1922, to October 30, 1922, deposited by the *Wolsum* to obtain its release pending the final determination of this suit, and that the said amount is for interest "corresponding to the premium that would have been required for an indemnity bond in like amount." It is a sufficient answer to such suggestion that the record is void of any showing as to what the premium would be for a bond of \$31,000 in force for the period above stated.

In reference to the damages sustained by the *West Himrod* only temporary repairs were made thereon in the Canal Zone in order that the vessel might be in a seaworthy condition to proceed on its voyage. Upon arrival at its final destination it seems that it was taken out of commission by the Government. The depositions on behalf of the *West Himrod* were all taken by counsel representing the Government living in Seattle, who for some reason not disclosed by the record did not interrogate any of said witnesses concerning the damages sustained by the *West Himrod* as a result of its collision with the *Wolsum*. When the Canal Zone attorneys learned of such omission, it then was too late to procure testimony on the desired subject.

Testimony at the oral hearing was presented to the effect that a thorough examination of the *West Himrod* was made immediately after the accident and under the supervision of the port superintendent. Temporary repairs were made on the vessel's starboard side of the bow and some repairs to its stern. It was necessary to patch holes in the vessel's hull above the waterline which were caused by the collision, and temporary patches were installed so that no trouble might ensue in the event of heavy weather at sea. Testimony showed that the value of said repairs amounted to \$350.74.

It having been concluded that each vessel was at fault until the moment of collision, a decree will be signed equally dividing between them the total damages of \$36,641.73 and the court costs taxed.

MCNEIL *versus* PANAMA R. R. CO.

(District Court, Canal Zone, Balboa Division, April 6, 1923.)

Civil No. 541.

1. CANAL ZONE. GOVERNMENT OF.

Congress has plenary powers in all matters pertaining to legislation for the Canal Zone.

2. EMPLOYERS' LIABILITY ACT.

On demurrer to the plaintiffs' complaint, where it appears that the plaintiff's decedent was employed by the defendant as a driver of one of its ice trucks and as a result of the negligence of the defendant such employee was killed,

held, that the plaintiff is entitled to recovery under Employers' Liability Act of 1908 for the death of such employee.

Attorneys for plaintiff, *Todd and McIntyre and L. S. Carrington.*
Attorney for defendant, *John O. Collins.*

WALLINGFORD, District Judge. For present purposes this case may be shortly stated. The Panama Railroad Company, a New York corporation, operates in part across the Isthmus not only as a common carrier by rail but among its other activities are those of operating motor trucks for the purpose of delivering ice to retail consumers. While engaged in Balboa within the Canal Zone as an employee of said railroad, the plaintiff's decedent, who was driving an ice truck in the course of his employment, was killed. The plaintiff alleges that such wrongful death was the proximate result of said railroad's negligence in knowingly furnishing the deceased chauffeur with a defective motor truck from which deliveries of ice were made. Accordingly, judgment in damages is asked under the provisions of the Federal Employers' Liability Act of 1908.

The railroad company has interposed a substituted demurrer to plaintiff's complaint, raising therein the question of the applicability of said act to the case at bar.

The first Employers' Liability Act of 1906 was held invalid by the National Supreme Court because its terms included all carriers engaged in interstate commerce between States, as well as all their employees regardless of whether the employer was engaged in or the injured servant was employed in interstate commerce at the time of the injury. In said opinion, however, the court declared the terms of the act capable of separation by judicial interpretation and therefore valid so far as they pertained to the Canal Zone and to other territorial possessions of the Continental United States for the reason that Congress had plenary powers in all matters pertaining thereto including the District of Columbia.

The Act of 1908 successfully corrected the errors of the one of 1906 as pointed out by the Federal Supreme Court, and by the latter has been declared constitutional. In this later enactment practically the same provisions as in the 1906 act occur respecting the liability of a common carrier by railroad in the Canal Zone to an injured employee. The second section thereof provides that every common carrier by railroad on lands of the United States, other than States, shall be liable in damages for injuries to or wrongful death of any of its employees due in whole or in part to the negligence of the carrier or its employees or to its defective equipment or property. There being in the 1908 act no qualification or restriction as to the business in which a common carrier by railroad in any territory such as the Canal Zone or its employees may be engaged at the time of the injury,

it follows that the holding must be that the complaint in the instant case sets forth a cause of action. The act by its terms is not limited to railroads in territories engaged as common carriers in commerce and to their employees engaged in the work of common carriers in commerce. It does on the other hand embrace every common carrier by railroad in Federal territories in whose employment of whatever nature any employee is negligently killed or negligently injured in the course of and growing out of his employment. A contrariwise conclusion, such as contended for in the substituted demurrer, would amount to so-called "judicial legislation."

Accordingly, the substituted demurrer of the defendant railroad company to the complaint of plaintiff is overruled, to which ruling it is given an exception.

LINDO *versus* BARKER.

(District Court, Canal Zone, Balboa Division, April 6, 1923.)

Civil No. 565.

1. ATTACHMENT. WRONGFUL ATTACHMENT. DAMAGES.

The plaintiff rented an automobile owned by him to a chauffeur to be used as a public service vehicle. While being operated under lease the plaintiff's machine and that of the defendant collided. Defendant thereupon brought an action in Magistrate's Court and secured the issuance of an attachment under the provisions of section 443, Code of Civil Procedure, and seized the plaintiff's automobile and held it for 38 days, when the attachment proceedings were dismissed and the plaintiff's car returned to him. Plaintiff brings this suit to recover damages for the wrongful attachment of his property and it is held,

1. That the plaintiff may sue on an attachment bond and recover according to its conditions, or he may sue on the facts of the case and recover his damages as if the plaintiff had given no bond.
2. This action is deemed to be under the last preceding statement.
3. In such an action an attachment is wrongfully sued out where it is issued against a person who is not indebted to the attaching plaintiff and against whom the plaintiff in attachment has no valid claim followed by a seizure of property under the writ. And inasmuch as the defendant in this action had no valid claim against the plaintiff in this action, the attachment was wrongfully sued out and the property wrongfully seized.
4. It is not necessary in such an action either to plead malice or lack of probable cause in order to recover actual damages.
5. On the cross complaint of the defendant, Barker, for damages sustained because of the negligence of the driver of the Lindo machine, it is held, that the defendant is not entitled to recovery because the chauffeur was an independent contractor, or independent licensee for whose negligence plaintiff, Lindo, was not responsible.

Attorney for plaintiff, *L. S. Carrington.*

Attorney for defendant, *Felix E. Porter.*

WALLINGFORD, District Judge. Emptying from the amended complaint all immaterial allegations, it sets forth in substance that James N. Barker did commence a suit in attachment against Anibal Lindo in the Magistrate's Court for the subdivision of Balboa, and did cause to be attached Lindo's automobile which was held in legal custody for a period of 38 days and then was returned to its owner. The alleged claim of Barker against Lindo grew out of an automobile collision within the limits of the Canal Zone. At the time Barker was driving his own machine. The evidence was clear and undisputed that Lindo prior to the accident had orally leased and had surrendered possession of his car to a taxicab driver by the name of Birchwood for a daily rental of five dollars, payable each day whether or not Birchwood's daily receipts for fares warranted him in so doing. Under the terms of the contract the owner was to keep his car in a reasonable state of repair, but the licensee was to furnish all gasoline and oil consumed in operating the public service vehicle. The licensor under the agreement retained no control over the movements of the licensee and he was only interested in collecting the daily rent and keeping the car in a physical condition for its use by the licensee. On the day of the collision Birchwood had sublet the use of the car for that day to chauffeur Earle.

In the said attachment suit Barker claimed damages from Lindo as the result of his car being injured by the car owned by the latter. Subsequently and on September 20, 1921, said attached property was ordered released by the plaintiff and the attachment proceedings were terminated before any trial by the surrender of the automobile to Lindo.

In the action in the case at bar the plaintiff, Lindo, demands judgment against the defendant, Barker, for damages sustained by reason of the writ of attachment being wrongfully sued out, resulting in a wrongful detention of his said automobile.

A reading of the amended complaint demonstrates that the action is not one of malicious prosecution as claimed, but is an action for damages because of a wrongful suing out of the attachment or a wrongful detention of personal property. A malicious prosecution proceeding is for the recovery of damages to person, property, or reputation shown to have resulted proximately from a previous civil or criminal proceeding, which was commenced or prosecuted without probable cause and with malice, and which terminated unsuccessfully. In the case at bar there is no claim either of malice or that the original suit was prosecuted to a successful termination in the magistrate's court. Neither is it a suit upon the bond filed in said last-named court, and in this action a copy of the bond is attached to the complaint merely as explanatory of the various steps taken in the magis-

trate's court by Barker in order to obtain his writ of attachment. In short this proceeding is a demand for a recovery of actual damages claimed to have been sustained by the plaintiff herein on account of the attachment in the first instance having been wrongful or without sufficient cause. In accordance with the practice as outlined in the Code of Civil Procedure such a demand properly may be presented even though the complaint does not allege that the attachment was procured with malice and without reasonable cause. The existence of such a right is referred to in subparagraph 3 of section 42 of the Code of Civil Procedure, wherein it is set forth that no action can be brought within 2 years for the recovery of damages for taking, retaining or injuring personal property; though it is true that were this proceeding one for redress from malicious prosecution, then action for damages necessarily would have to be brought within 1 year after the cause of action occurred (par. 4, sec. 42, *Idem.*). It also provided in section 443 of said code that when a bond is filed as a condition precedent to the obtaining of a writ of attachment, the same must be conditioned that the attaching creditor will pay all costs which may be adjudged to the debtor, and all damages which the latter may sustain by reason of the attachment if the same shall finally be adjudged to have been wrongful or without sufficient cause. If, therefore, this proceeding was a suit on the attachment bond, the plaintiff could recover his actual damages if he demonstrated that the attachment had been wrongful or without sufficient cause. He would not in addition have to show in order to recover on such a bond that the original proceeding was instituted and prosecuted with malice or without probable cause. The object of the attachment bond is to secure the payment of any liability to the one injured, but the bond does not create the liability. Without any bond having been filed, if through inadvertence or mistake a writ were issued, under the law the actual damages could be recovered if it were found that the attachment had been wrong. If the injured one wished to recover punitive damages he then would of course have to allege and prove malice and lack of probable cause but in the instant case no punitive damages are claimed.

This case at bar seems to be in harmony with *German vs. Stewart, etc., Co.*, 12 Federal Reporter, 266, which was based upon the Tennessee Code containing provisions similar to the ones in the Canal Zone Code of Civil Procedure. In that case it is pointed out that the plaintiff on principle should be bound without any bond and outside of it and that his sureties may not be. The conclusion was in that case that the defendant in attachment has three remedies: The first one is that he may sue on the bond and should recover according to its conditions; or, second, he may sue the plaintiff on the facts of the case and recover according to the statute precisely as if the plaintiff had given a bond;

or third, he may sue for malicious prosecution as at common law and may recover according to the common law where there has been malice and want of probable cause. As above indicated, this suit at bar rests upon the foregoing second proposition.

An attachment may be said to be wrongfully sued out where it is issued against a person who is not indebted to the attaching plaintiff and against whom the plaintiff in attachment has no valid claim, *Vesper vs. Crane Co.* (Cal.), 130 Pac., 876; *King vs. Kehoe* (Iowa), 58 N. W., 1071; *Smith vs. Morgan* (Texas), 56 S. W., 950; 6 C. J., 498. Good faith of the attachment plaintiff does not affect the application of the foregoing rule, *Tucker vs. Adams*, 52 Ala., 254. Now Mr. Barker in fact never had a valid claim against Lindo growing out of the the said automobile collision for the reasons briefly outlined in the concluding part of this opinion. Lindo never was indebted to the attaching plaintiff because of said accident. Hence under the rule the attaching of Lindo's vehicle was wrongful and such the fact remains to be regardless of any voluntary abandonment or dismissal of the attachment which action in some jurisdictions, as in Tennessee, renders the attaching creditor responsible for damages for a wrongful suing out of the writ although in other jurisdictions the contrary rule is held to prevail, 6 C. J., 499. It is conceded that before any trial was had Mr. Barker caused the dismissal of the original attachment proceedings in the lower court. Such a dismissal was equivalent to admission that the attachment was wrongful. As stated in the above cited Tennessee case, "The very obligation of the plaintiff is (and this whether he gives a bond or not, for he is not entitled to the writ on any other condition) that he will prosecute said suit with effect or in case of failure therein will well and truly pay and satisfy the said Lindo for all costs and damages as may be awarded against him. The Code of Civil Procedure (section 443) provides that in the bond plaintiff must agree to pay all costs which may be adjudged to the defendant and all damages which he may sustain by reason of the attachment, if the same shall finally be adjudged to have been wrongful or without sufficient cause. The definition of the word "wrongful" therefore is as explained in the said Tennessee case, "a failure to prosecute with effect, and we are not authorized in any suit for these statutory damages to import from the common law any element of malice or want of probable cause, for the statute does not require it, and its object is to create a right or remedy, and to prescribe its limitations and conditions. * * * If the statute did not fix these damages, the defendant in attachment could obtain only such as the common law would give him."

In order to have maintained any attachment proceedings at all against Lindo, it was incumbent upon Barker to rely on section 443

of the Civil Code to the extent of filing a bond that he would pay to Lindo all damages sustained by the latter if the said proceedings finally were adjudged to have been wrongful. As above pointed out, they have been so determined. Also, as heretofore explained, an attachment defendant in this jurisdiction is not forced to sue for damages either in the form prescribed by common law or on the attachment bond. He may pursue the third course of recovering his actual damages for the wrongful taking, retaining or the injuring of his personal property without alleging either malice or lack of sufficient cause. This so-called third right of action is the one Lindo adopted in this case, *Connelly vs. Woods* (Kan.), 2 Pac., 773; *Wall vs. Hardwood Mfg. Co.* (La.), 127 La., 959 or 54 So., 300; *Wellington vs. Spencer* (Okla.), 132 Pac., 675; *Decatur, etc., Bank vs. Houts* (Tex.), 19 S. W., 1080; 6 C. J., 495 section 1173.

Respecting the proof submitted as to the damages sustained as the proximate result of a wrongful detention of plaintiff's motor car, the conclusion is that plaintiff failed in substantiating his entire claim of \$345.20 therefore. The testimony as to the comparatively new automobile casings being damaged to the extent of \$60 solely on account of their nonuse in a covered stall for 38 days only is not convincing but is speculative, and smacks of guess work. From the evidence it could be just as readily inferred that the deterioration was the result of inherent weakness or of reckless use and not because of standing motionless in a covered structure. The same criticism properly may be levied against the \$75 for overhauling the car upon its release. No showing other than that it was being daily operated, was made as to whether or not it was in need of cleaning and overhauling just prior to its seizure, nor is the testimony of the witness offered in support of said item to the effect that the overhauling work done was made necessary because of the idleness of the automobile for 38 days anything more than speculation on his part. At least the claimed damages as to casings and cost of overhauling have not been established by satisfactory testimony or by the greater weight of the evidence. The following items, however, have been established as the proximate result of the wrongful detention of plaintiff's automobile, viz.:

\$190.00	38 days at \$5 a day lost by plaintiff.
8.00	writ of <i>certiorari</i> costs.
9.20	costs in reference to the writ of prohibition.
3.00	garage rental or storage during 38 days.
<hr/>	
\$210.20	total.

It follows from what has heretofore been said that the plaintiff herein is entitled to recover the sum of \$210.20 in damages.

The defendant, James N. Barker, in his cross complaint filed herein, demands judgment against plaintiff in the sum of \$750 in damages.

He bases his claim upon the proposition that Anibal Lindo, as the owner of the other automobile is responsible, for the damages inflicted upon the Barker motor car. However, the undisputed testimony is that Lindo on the day in question had no control whatsoever over his own car, and that at said time it was not being used in accordance with any direction from him or in behalf of any business which he was conducting. So far as chauffeur Birchwood was concerned, he occupied the position of an independent contractor or an independent licensee. For any damages that the Lindo car may have inflicted on said date, Lindo would not be responsible but chauffeur Essex would be the one to be held for any damages and also the licensee, Birchwood, might be held reasonably amerced in damages, depending however upon the nature of the relationship actually existing between him and Essex. It necessarily is clear that in no event would Lindo be responsible under the evidence submitted in this case. Because of this conclusion it necessarily follows that the court is constrained to hold that the said cross complaint should be dismissed.

The foregoing conclusions render it unnecessary to dispose of collateral questions raised during the progress of this case. A judgment entry will be signed and filed in harmony with the foregoing findings and conclusions.

GOVERNMENT *versus* DE LIMA.

(District Court, Canal Zone, Balboa Division, June 20, 1923.)

Civil No. 1992.

1. CRIMINAL LAW. FALSE PRETENSES.

False pretenses of an attorney made to his client that he will be able to procure a desired result through action of the Canal Zone authorities, are not a sufficient basis on which to rest a prosecution for obtaining money thereby.

For plaintiff, *G. H. Martin*, District Attorney, and *J. J. McGuigan*, Assistant District Attorney.

For himself, *H. A. De Lima*.

WALLINGFORD, District Judge. The information charges the defendant with the crime of obtaining money from the Chinese firm of Han Hap Company by false pretenses. It appears from the record that Li Yin is the manager of the Chinese mercantile firm of Han Hap Company, doing business in the Republic of Panama, and that said firm was desirous of locating one or more branch stores in Balboa and elsewhere on the Canal Zone. This proceeding is the outgrowth of its employment of Attorney De Lima to accomplish such desired end. The first installment of the total agreed attorney fee of \$500 was paid

on December 11, 1922. Four canceled checks given by said firm to defendant were introduced in evidence, the last one being dated January 2, 1923. Some of these checks were cashed by the defendant within the Zone, and at least one of the conversations in which it is claimed that false representations were made by the defendant also took place therein. Section 34 of Title III of the Laws of the Canal Zone, in part, provides that all persons are liable to prosecution and punishment who commit in whole or in part within the limits of the Canal Zone any act constituting a crime within the terms of our own laws. It follows therefore that, if a crime were committed, this court has jurisdiction in the premises, even though only a part of the acts constituting same transpired within the Zone and the remainder within the Republic of Panama.

To substantiate the crime charged, the Government must have shown beyond a reasonable doubt (1st), a false pretense by the defendant, (2d), his knowledge of its falsity, (3d), a reliance upon such pretense, by Li Yin,, (4th), defendant's intent at the time to defraud, and (5th), the actual defrauding by him by having cashed one or more of the checks given to him. Further the law requires that the false pretense relied upon must be concerning an existing fact or a past event. A false pretense or representation as to something to take place in the future constitutes no element of the crime charged.

The evidence shows that no one else was present during any of the conversations had between the defendant and Li Yin acting for the firm, save a nephew of the latter who failed totally as a witness to throw any reliable light upon the matter in hand on account of his meager knowledge of the English language in which the negotiations were conducted. The nature of those conversations must be determined alone from the testimony of the client and his attorney and from the natural deductions to be drawn from it and from the attending circumstances disclosed on the hearing. Even Li Yin's knowledge of our language has outstanding limitations.

The false pretenses as testified to by Li Yin and relied upon by the Government are in substance that Attorney De Lima before all of the agreed fee was received did point out a particular lot to Yin with the statement that he had secured it as a building site for the Chinese firm, that several times the defendant said everything was all right, that the desired permission for a Zone site and building had been granted and the business fixed. Standing alone, such statements if made would be false representations or pretenses of a past or present fact. The defendant in his testimony denied ever having made such representations in the past or present tense. He testified that he informed his client of other independent commercial activities already located on Zone soil, and of his conviction that he could procure

him a like permission. That such conviction was grounded in good faith, and that he continued to believe from circumstances recited by him in his testimony that he would obtain the coveted permission until the receipt by him on February 9, 1923, of a letter from the Executive Department to the contrary. His contention was that he was employed to put forth his best efforts to obtain a permit that he was then confident could be procured, that he kept his client advised of his activities in his behalf, and that his statements concerning the desired permission were merely honest expressions of his intentions, expectations, desires, belief and seeming ability to bring about the wished for result. The fact that he had canvassed the possibilities and probabilities of the situation was testified to by several different Canal Zone officials, who all informed him that a final decision rested with the Governor who was then in the States. Some of these witnesses predicted defeat, while others expressed to him comments of a favorable nature calculated to inspire one of ultra optimistic tendencies into making unreliable and extravagant predictions.

A dispassionate consideration of the testimony of Li Yin lends support to the denials of his lawyer. The charge of having made the alleged false pretenses to Li Yin finds little support in other portions of Yin's testimony. This last observation in no way is to the discredit of his veracity and integrity. They both are favorably and firmly established. Mr. Li Yin's lack of familiarity with our language especially as to his use of the past, present and future tenses of verbs, renders it difficult at times for him to grasp clearly what is said to him and to testify persuasively in reply to questions put to him. For illustration, he testified that on December 11th last the defendant told him that "The Governor write letter and give permission to establish store there." Whether he meant that defendant did assert that such a letter had been written giving the desired permission or that it would be written in the future is a matter that is left to conjecture.

A brief reference may well be made to the testimony of Li Yin which raises a substantial doubt that the alleged false representations were made or that Li Yin understood that his attorney had closed all negotiations satisfactorily and that nothing remained to be done by him in the premises. Rather is it evident from his testimony that he understood definitely that he was employing an attorney whose services were to be rendered in order to bring about a business location for him on Zone territory. He stated that in his initial talk with De Lima the latter *offered* to get a location for him, that upon making the contract of employment it was agreed between the two that De Lima was to then receive half of the agreed fee and that the remaining half only was to be paid when his services *were completed*, that just pre-

ceding the payment on January 2, 1923, of the last installment of the attorney fee De Lima told him that everything was fixed except an O. K. or approval *had to be obtained* from the Governor of the Zone who on that date was in the United States, that on the same date De Lima agreed to discount his attorney fee \$50 and, as evidence of full payment, Li Yin then received from defendant a receipt reading:

Received on various dates from Han Hap & Co. sums which total \$450 in payment legal services *to be rendered* in obtaining licenses to open store in Canal Zone and services in connection therewith.

The record also shows a letter written by said witness to defendant on February 15, 1923, in which is the language "I want to know how the matter can be done because that the time have already gone and I can't see the thing any result. Did you remember that you promise me last December that matter be succeed on the 15th of January, and up to date nothing."

The foregoing mentioned portions of Mr. Yin's testimony need no further comment other than to suggest that they demonstrate that the real pretenses upon which he relied were those of his attorney as to his own ability to accomplish results. His testimony last above mentioned clashes and does not harmonize with his quotations as to what he understood De Lima said concerning the latter's own past or present accomplishments respecting the project in hand. The natural conclusion is that this prosecuting witness was misled; and that what did cause him to part with his money was his reliance upon defendant's persuasive personality and prophecies rather than upon any untrue statement by the latter of a past or present fact. At any rate a rereading of the record since the trial demonstrates that the Government did not prove the guilt of defendant beyond a reasonable doubt. No mere preponderance or greater weight of evidence is sufficient. It follows that the defendant must be discharged. This conclusion renders it unnecessary to comment on other questions presented. Accordingly an order will be entered in defendant's favor of "Not guilty."

VOLOSHIN, *et al.*, *versus* RIDENOUR, U. S. Marshal.

(District Court, Canal Zone, Balboa Division, August 30, 1923.)

Civil No. 614.

1. EXTRADITION. INFORMATION. AMENDMENT.

Where the parties sought to be extradited are present in the jurisdiction where the information is filed and they are held under a warrant of arrest issued in the case, and the information specifies a treaty crime, it is proper for the court to permit an amendment to the information in matters of form, giving in greater detail the facts surrounding the crime charged, and such question can not be raised by means of a *habeas corpus* proceedings.

2. EXTRADITION. SECOND ARREST. VALIDITY.

1. The treaty between the United States and Chile provides that a person provisionally arrested for extradition shall not be detained for a longer period than 2 months. The petitioners were arrested first May 28, 1923. July 28, 1923, the proofs of criminality not having been properly certified nor admissible in evidence on the hearing, the petitioners were discharged and were immediately thereafter rearrested on a second warrant for detention. The instant proceeding was brought under the provisions of R. S. 5270 *et seq.*, which contains no limitation on the number of warrants which may be issued in order to effect extradition. Held,
 1. That Chile in seeking the extradition of the petitioners had the right to proceed either under the provisions of the treaty or under the laws of Congress relating to extradition, and that having elected to proceed under the laws of Congress it had the right to have issued a second warrant for detention and to detain the petitioners for an additional period upon a showing that it was in good faith seeking the extradition of the petitioners.
 2. That a treaty of extradition implies that either Government thereto when called upon by the other will use its utmost good faith and effort to comply with the extradition of alleged criminals present in its territory on the demand of the other Government, and that the court in furtherance of such purpose under the facts of this case has jurisdiction to issue a second warrant for the purpose of affording Chile the opportunity of presenting its proofs of criminality.
 3. That the two proceedings are separate and distinct proceedings, and that the limitation of 2 months contained in the treaty applies to each particular proceeding and not to the two proceedings cumulatively.

Attorneys for petitioners, *L. S. Carrington* and *Harmodio Arias*.

For respondent, *G. H. Martin*, District Attorney, and *J. J. McGuigan*, Assistant District Attorney.

WALLINGFORD, District Judge. The Chilean Consul General to the Canal Zone upon request of his Government by cable did file heretofore in this jurisdiction an information against Gabriel Constantine Voloshin and Eugenia C. Bolshago, charging them with having committed in the month of April, 1923, while then in Chile, the crimes of robbery and murder. They are subjects of the Government of Russia. They arrived at Cristobal, Canal Zone, in May, 1923, from a South American port, en route via San Francisco to Yokohama. They were arrested in the Canal Zone on May 28, 1923, by H. D. Ridenour, the United States Marshal, acting under authority of a warrant issued under an order of this court.

Article 4 of the treaty between the Republic of Chile and the United States in substance provides that any fugitive from justice of one of the contracting parties who has sought an asylum in the territory of the other is to be detained only for a period of 2 months from the date of his provisional arrest or detention if meanwhile no formal requisition for his surrender, accompanied by necessary evidence of his criminality, has been produced. Upon the expiration of the said 2

months period, the petitioners were ordered discharged for the reason that the documents received from Chile containing evidence of criminality were prepared upon the erroneous theory that the Republic of Panama instead of the Canal Zone had custody of them, and for the further reason that the said documents were insufficiently certified. Immediately following the entry of the order of discharge of July 28, 1923, and while the two petitioners were still in court, they were again arrested by the said marshal by virtue of a warrant based upon a new information by the same affiant, in which he charged petitioners upon information and belief with having committed, while in Los Andes, Chile, on or about April 21, 1923, both robbery and murder, and in which he asked that they be arrested and detained pending arrival of extradition papers in regular form from the Chilean Government. On August 25, 1923, permission of court was accorded the said Consul General to the Canal Zone in this second pending extradition proceeding to file an amendment to his verified complaint. This amendment in no way changed the nature of the extradition crimes charged originally but did with particularity set forth the known facts and circumstances upon which his belief was founded that one Joseph Lipshic was robbed and murdered by petitioners during the month of April, 1923, in Los Andes, Chile. The said two suspects now are being held in custody in the Canal Zone by the United States Marshal pending the arrival from Chile of the documents required to be produced at any formal hearing in extradition proceedings held within 2 months from July 28, 1923.

On August 16, 1923, the two petitioners above named filed their application for a writ of *habeas corpus*. They were given thereon a hearing in this court on August 20, 1923. At the conclusion thereof, the Court took the case under advisement pending the filing of briefs by the attorneys.

The two petitioners in the *habeas corpus* proceeding alleged that they should be discharged for two reasons:

First: That the second information filed against them on July 28, 1923, is fatally inadequate as to its form in that its wording is too vague and uncertain so as to charge any crime against them and that such defects can not be remedied by any amendment.

Second: That since the petitioners already had been in custody for 2 months and then had been discharged, this court now has no jurisdiction to longer provisionally restrain them upon a second information charging them substantially as in the one first filed.

In reference to the first objection urged, the two petitioners assert that the second warrant for their arrest and detention is based upon an affidavit of Sr. Rios, Consul General of Chile to the Canal Zone that charges no crime with sufficient particularity to give the court

any right to longer have them detained. They maintain that properly any warrant based on a wholly invalid complaint necessarily itself is invalid. It of course is true that if such a complaint charged no offense or some offense not embraced in or excluded from the list of extraditable crimes specified in the treaty, it would be deemed fatally defective upon which no valid warrant for the arrest and detention of alleged fugitives from justice could be based. In those instances, however, where a complaint is elliptical somewhat as to form and is susceptible of being made more ample and specific in respect to the identical crime originally charged, amendments are permitted. In such instances the substance or subject matter of the complaint remains the same. In no way are such amendments prejudicial to the rights of those who seek an asylum within our own borders. If called for by them or if the sufficiency of the charge as made is attacked, they are entitled to receive before their case is finally submitted for determination any further details in the form of amendments that are available and material. Even after submission and prior to judgment there is a certain class of cases in which an amendment may be received in order that the pleadings may be made to conform with the proof. In the complaint or affidavit of the Chilean Consul General now attacked, which complaint he filed at the request of his Government by cablegram, he charges petitioners upon information and belief with having committed, while in Los Andes, Chile, on or about April 21, 1923, both robbery and murder. These two crimes are extraditable ones under the terms of the treaty between that Republic and our own. When the second affidavit or complaint was presented and the order for arrest was entered, the two petitioners as well as the Court knew among other things that copies of the testimony of witnesses taken in Los Andes, Chile, were in the court room, which copies contained a sufficient showing of criminality to support an affidavit made upon information and belief, even if any such were necessary at this preliminary stage of the extradition proceedings so as to make effective an order for provisional arrest and detention. The petitioners having been taken into custody while within the Canal Zone limits upon a warrant charging them with the commission while in Chile of two of the crimes specified in the treaty as being extraditable offenses, it follows that this court has jurisdiction in the extradition proceedings now pending both of the petitioners and of the subject matter.

This same contention that the affidavit or complaint in extradition proceedings is not susceptible of any amendment in order to make its terms more specific has been presented to other courts in other cases. In the circuit court case *in re* Adutt, decided in April, 1893, 55 Fed., 376-379, Judge Jenkins in holding the complaint in an extradition

case sufficient although greatly wanting in particularity of description stated that, "In all such cases as these, the commissioner, upon objection of the petitioner, should require an amendment of the complaint, that the petitioner may be fully informed of the particular charge for which he is sought to be extradited and all the particulars of that charge." That court further stated that the filing of any such amendment is "a matter for the commissioner acting with his jurisdiction, and not a matter going to the jurisdiction of the commissioner to entertain the complaint." It is pointed out in this case last cited that the substance of the offense charged should be stated in the affidavit or complaint in extradition proceedings so that the Court may see that the particular crime charged is one enumerated in the treaty. In charging some crimes, more particularity of description would be required than in charging others, but a complaint or affidavit in extradition proceedings is not required to charge a crime with the precision and particularity of an indictment. Only the substantial and material features of the alleged offense need be set forth.

In the case of *ex parte* Sternaman, 77 Fed., 595, the court quotes in approval from the case of "in re. Adutt" above cited respecting the right in extradition proceedings to amend the complaint in order to make it more exact and specific.

It seems clear from the reasons stated that at least it can not be successfully contended that an information in extradition proceedings may not be properly amended at any time prior to final hearing on its merits. At present these defendants are detained provisionally on the charge presented for a period of 2 months expiring September 28, 1923. They should not be discharged in any *habeas corpus* proceeding instituted prior to the date of final hearing upon technical grounds. A sister republic with whom we have a treaty should be given ample opportunity in the exercise of good faith to amend its request or complaint within the limitation period specified in the treaty. Inasmuch as an amendment to the second complaint already has been allowed to be filed, it as now amended meets the objections raised as to its indefiniteness.

Though the petitioners may not agree with the foregoing conclusion as to the lack of merit of their first objection to the complaint, nevertheless the rule appears to be that such a criticism lodged against it as to its lack of particularity and general indefiniteness pertains only to matters of form. They are complaining of what the authorities designate as "mere irregularities." The case of *Ormsby vs. United States*, 273 Fed., 977-982, involved an indictment believed to be insufficiently specific so as to give the court jurisdiction. It was held therein that the court possessed power to determine the sufficiency of the

indictment, that its action in sustaining and acting upon it was not reviewable in *habeas corpus* proceedings, but that such action only could be reviewed in *certiorari* proceedings or by writ of error. The Supreme Court of the United States, *Hogan vs. O'Neill*, 255 U. S., 52-55, in deciding that the indictment under consideration in that case was sufficiently adequate in form, stated that "were there any doubt of the sufficiency of the indictment as a pleading, it would not be open to inquiry on *habeas corpus*."

In respect to this first objection of petitioners, the conclusion is that it can not be maintained.

In respect to the above-stated second ground of lack of any jurisdiction of this court in issuing its order of July 28, 1923, for a second arrest, it is asserted that petitioners were arrested first on May 28, 1923, and were detained in custody within the Canal Zone provisionally for a period of 2 months or until July 28, 1923; that on the date last named an order of discharge was entered by this court because of palpable defects in the documents forwarded by the Chilean Government upon which its claim for extradition was to be founded; that they were at once rearrested on a new warrant based on a new affidavit charging them with the same two crimes as set forth in the first information, and that they now are being provisionally and illegally detained in custody beyond the term of 2 months from the date of their first arrest on May 28, 1923, contrary to the provisions of the extradition treaty between the United States and Chile (*Malloy on Treaties and, etc.*, Vol. I, p. 192-194, Ed. 1910). Article IV thereof is in the following language:

Where the arrest and detention of a fugitive are desired on telegraphic or other information in advance of the presentation of formal proofs, the proper course in the United States shall be to apply to a judge or other magistrate authorized to issue warrants of arrest in extradition cases and present a complaint on oath, as provided by the statutes of the United States.

When, under the provisions of this article, the arrest and detention of a fugitive are desired in the Republic of Chile, the proper course shall be to apply to the foreign office, which will immediately cause the necessary steps to be taken in order to secure the provisional arrest or detention of the fugitive.

The provisional detention of a fugitive shall cease and the prisoner be released if a formal requisition for his surrender, accompanied by the necessary evidence of his criminality has not been produced under the stipulations of this treaty, within 2 months from the date of his provisional arrest or detention.

It is because of the limitation of 2 months referred to in that part of the treaty above quoted that the petitioners assert that the court had no jurisdiction to order the issuance of the second warrant. The case of *ex parte*, Reed, 158 Fed., 891, decided in 1908 by District Judge Lanning, is cited in support of their contention. That case called for a construing of the effect of that part of the Mexican Treaty that provided that a fugitive from justice might be provisionally

arrested and kept in custody for such time as may be practicable, not exceeding 40 days, to await the production of documents upon which the claim for extradition was founded. Judge Lanning in his opinion held to the view that the treaty provisions precluded the detention of such a person for a longer period than 40 days under the warrant authorizing his detention, and as more than 40 days had expired that he must be discharged. In that decision the effect of a second order of arrest on a new complaint was not discussed. It merely announced that the terms of the treaty contained no intimation that the petitioner may be held under any one detention order after 40 days had expired to await the production of formal extradition documents. That such must have been the meaning of Judge Lanning is evidenced by the fact that just following the rendition of his opinion the Mexican papers in proper form arrived. Thereupon a second complaint was presented to the judge who promptly signed an order thereon directing a new warrant to issue. Upon this second warrant the prisoner was rearrested, a hearing was had, a motion of his counsel to dismiss the proceedings was refused and the prisoner was committed for extradition. Thereafter the entire record was certified to the Secretary of State who authorized the surrender of the prisoner to the Mexican authorities. A review of this decision in the Reed case and of the proceedings immediately following suggest that the said case is no persuasive authority in support of the contentions of petitioners in the case at bar. The final action of Judge Lanning and the approval thereof by the Department of State at Washington are equivalent to a holding that a second order for arrest and detention, if good faith in the prior proceedings was exercised, may properly follow in order that a full showing may be made, that the provisional detention for a definite limited period specified in the extradition treaties with Chile, Mexico, Denmark, Japan, Portugal, Nicaragua and many other countries applies only to extradition proceedings then pending, that the two proceedings are separate and distinct and that the length of time a prisoner may have been detained following his first arrest can not interfere with or lessen the full period of time specified in the treaty during which he may be provisionally detained upon a second warrant based on a second complaint. The case in *re. Dawson*, 101 Fed., 253 also cited by petitioners, involving a construing of section 5273, Fed. Statutes Ann., likewise seems to be no more in point than does the Reed case, *supra*.

From still another viewpoint, the merits of petitioners' second contention may be considered. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign Government, then sections 5270 to 5279, Vol. 3 Fed. Statutes Ann., 2d Ed., pages 265-312, may be complied with in order

to effect the delivery to any such foreign Government of any fugitive from justice within our own borders. Without herein setting out the foregoing sections, it is provided by the terms of the said treaty with Chile that extradition of fugitives shall be carried out in the United States in conformity with the extradition laws in force in the United States. These laws are contained in the foregoing cited sections of our Federal statutes. As observed by Judge Brown in *Castro vs. De Uriarte*, 16 Fed., 93, in extradition cases under our Federal laws there are two proceedings available to the demanding Government having an extradition compact with our own Government, one being according to the provisions of the treaty alone, and the other under the revised statutes as well. Congress adopted the procedure indicated by the foregoing sections 5270, *et seq.*, in aid of all extradition treaties. In order to facilitate the extradition of alleged criminals, it has dispensed with certain preliminary requirements found in some treaties which otherwise it might be necessary for the foreign Government to strictly follow. While the Chilean Treaty provides that no preliminary detention shall continue longer than 2 months, yet there is no such inhibition in the revised statutes applicable to such cases. The Chilean Government so far as it is concerned, has waived or ignored any apparent treaty limitation of the detention period by filing a second and separate complaint and is proceeding in accordance with the procedure specified by the statutes. To such a course of procedure, the petitioners can not be heard to complain, *Castro vs. De Uriarte, supra*.

Also in the *habeas corpus* case of *Grin vs. Shine*, 187 U. S., 181 it was maintained that no certified copy of any warrant issued by the demanding sovereign had been produced as required by the terms of the treaty with Russia. The Supreme Court, however, stated that the United States by adopting sections 5270, *et. seq.*, had dispensed with said requirement. Further commenting, it used the following language:

The treaty is undoubtedly obligatory upon both powers, and, if Congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian Government and of further negotiations. But notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro vs. De Uriarte*, 16 Fed. Rep., 93. This appears to have been the object of section 5270, which is applicable to all foreign Governments with which we have treaties of extradition. The requirements of that section, as already observed, are simply a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty or convention, a certificate by the magistrate of such evidence and his conclusions thereon, to the Secretary of State. As no mention is here made of a warrant of arrest, or other equivalent document, issued by a foreign magistrate, we do

not see the necessity of its production. This is one of the requirements of the treaty which Congress has intentionally waived.

Both of the foregoing cases are cited in *Charlton vs. Kelly*, 229 U. S., 447, wherein the propositions contained therein are referred to with approval by the highest judicial tribunal within our own domain. On the propositions announced in these cases it is unnecessary to refer to additional citations. The principles that they announce need no elaboration.

The conclusion on the second proposition of petitioners is that jurisdiction of the court was not exhausted in the first proceeding initiated, that article 4 of the Chilean treaty above quoted as to provisional detention of 2 months applies exclusively to the extradition proceeding at the time pending, that at least where in the first proceeding there was no decision upon its legal merits following a full investigation, a second warrant and detention may properly follow similar in effect to successive preliminary hearings before local committing magistrates under ordinary charges of crime, that the two proceedings are separate and have no connection one with the other, that at any rate the two contracting Governments may ignore treaty provisions for the apprehension of alleged offenders except the one providing for the production of evidence of criminality, that Chile in this instance by filing a second information already has ignored the limitation period fixed in the treaty and has elected to rely upon said sections of our Federal Statutes which contain no limitation as to the period of provisional detentions of fugitives from justice. It follows that the petition of petitioners for their discharge from custody at this time should be and accordingly is denied, and that said petitioners be remanded to the custody of Horace D. Ridenour, United States Marshal for the Canal Zone. To all of which, the petitioners and each of them are given an exception.

ROWE *versus* THE ROYAL NETHERLANDS WEST INDIA MAIL COMPANY.

(District Court, Canal Zone, Cristobal Division, November 23, 1923.)

Civil No. 400.

1. ADMIRALITY. NEGLIGENCE. MARITIME TORT.

Plaintiff was a member of a stevedore gang engaged in unloading cargo from the S. S. *Aires* at Cristobal docks. The foreman of the gang had contracted to do the work and the plaintiff was his employee. While engaged in the work plaintiff had occasion to cross No. 5 hatch which had not been disturbed during the progress of unloading. When he stepped on the hatch one of the boards used as a hatch covering tilted and plaintiff fell through the hatch to the bottom of the ship, sustaining injuries for which he seeks recovery. Held,

1. That it was the duty of the ship to furnish the contracting foreman and his men a reasonably safe place to work, and that such duty was a positive and continuing one which could not be delegated.
2. That the ship was negligent because the plank in question was too short or not properly placed, and such negligence was the proximate cause of plaintiff's injuries, and that the ship and its officers knew, or in the exercise of ordinary care should have known, of the defect.

2. NEGLIGENCE. ASSUMPTION OF RISK.

A workman does not assume the risk incident to the ship's negligence unless the workman has knowledge thereof and continues in his employment with full appreciation of the attendant danger.

3. NEGLIGENCE. DISEASED CONDITION OF PLAINTIFF. DAMAGES.

Negligence of the defendant is not presumed from the happening of an accident; neither is a diseased condition of plaintiff presumed to be the proximate result of an injury. Such result must be proved. Where plaintiff was afflicted with tertiary syphilis at the time of his injury, he is not entitled to recover therefor unless he shows that such diseased condition has been aggravated as a direct result of such injury; and his damages will be limited to compensation for the aggravated condition.

Attorney for plaintiff, *L. S. Carrington*.

Attorney for defendant, *C. P. Fairman*.

WALLINGFORD, District Judge. This case is a law action in which the plaintiff, Herbert Rowe, demands judgment in the sum of \$5,500 against The Royal Netherlands West India Mail Company for personal injuries received in the course of his employment as stevedore on its ship, *Aires*, while in port at Cristobal, Canal Zone, on February 25, 1922.

A fair visualization as shown by the evidence of the facts upon which rest the conclusions reached in this case is as follows:

The new steamship *Aires* belonging to defendant arrived from Amsterdam on its maiden voyage at the Cristobal-Colon Harbor on February 24, 1922, laden with a general cargo for various southern ports, including Colon. This cargo was located not only below decks but also on the main, spar, and 'tween decks, which latter, respectively, are referred to in the evidence as the "main, middle, and lower decks." The five hatchways of the middle and lower decks, respectively, are directly beneath those of the upper deck of corresponding numbers. None of the hatchways are flush with the decks, but their coamings extend upward therefrom some few inches. The hatchways are 30 feet square, and when not in use are covered with 10 heavy planks of the dimensions of 4 by 2½ feet each. The ends of these planks rest on a flange on horizontal, movable iron girders or beams.

The cargo plan received in evidence showed in respect to the hatchways 4 and 5 that there was no cargo in the vessel for unloading at Colon or Cristobal either below decks or on the lower deck, but said

exhibit did show freight for Colon as being stowed on the middle deck. The three ship's officers whose depositions were taken do not claim that any cargo was discharged at the local port through either of said two hatchways 4 and 5 from below decks or from the lower deck, nor is any admission made by them that the coverings of said two hatchways on the lower deck or on the middle deck were disturbed while in port. Neither did they testify to any condition existing after arrival at the Isthmus that necessitated the removing or lifting of said hatchway coverings. In other words, they testified to the correctness of the cargo plan. All the witnesses for plaintiff who testified on the subject were positive that the No. 5 hatchway coverings on the middle and on the lower decks were never lifted or displaced after the vessel reached port and prior to plaintiff's accident. The only testimony to the contrary was that of the contracting stevedore and his helper at No. 5 hatch who testified for defendant that some cargo for Colon was taken from the lower hold through such hatchway. This evidence is directly contradicted by the cargo plan, by the sworn statements of the ship's own officers, and by plaintiff and his witnesses.

A contracting stevedore was employed by defendant to discharge the cargo for Colon. The independent contractor employed plaintiff and other stevedores to perform the work. Shortly after 11 o'clock p. m., the foreman of plaintiff ordered him to go from near hatchway No. 4 on the middle deck where he was working to that part of the same deck some 9 feet away to get a beam hook which was suspended over and near the center of No. 5 hatchway. Rowe and some of his witnesses stated that the planks comprising the covering of No. 5 hatchway were covered with a tarpaulin, while other witnesses asserted contrariwise. Whatever the fact may be as to the presence of the tarpaulin, there was no appreciable illumination at the place although Rowe stated that it was light enough from the cluster lights at said No. 4 hatchway to enable him to discern the suspended beam hook. He crossed lengthwise the first plank covering of 4 by 2½ feet, but the end of the adjoining plank tilted suddenly as he stepped upon it. He was precipitated some 18 feet to the bottom of the ship, his body passing through the lower deck hatchway which had been left open for some cause not explained in the evidence. The record is convincing that neither the independent contractor nor any of his stevedores had touched any of the boards of the No. 5 hatchway coverings on either the lower or middle decks. There was no testimony as to whether or not the coamings of No. 5 hatch on the middle deck were warped or that the loading of the cargo had bulged them in any way or that the plank covers thereof had become warped or contracted by seasoning. The evidence does establish the fact,

however, that the plank which tilted with plaintiff either was not long enough to rest securely upon the flanges at its ends or that the same was out of position. The possible deduction that such plank was too short finds support in the testimony of the witness, Reynolds, who stated that after the accident he "found a strip of wood on one side and wedges on the other side" of middle hatch No. 5, and by the witness, Worrell, who affirmed that the hatch covers at said place were short and that he found "wedges on both sides." It also is a persuasive fact that Rowe would not have fallen to the bottom of the vessel if the plank upon which he stepped had been adequate and in proper position.

The first proposition to determine is whether or not plaintiff's injuries were the proximate result of any negligence of defendant. In those cases where shipowners furnish to stevedores employed by a master stevedore a safe place in which to work and a safe passage thereto and therefrom, their duty to such laborers is ended. As stated in the case of the *Kongosan Maru*, 282 Fed., 667, "Primarily the ship is bound to turn over to an independent contractor for discharging and taking on cargo a vessel in safe condition, and to that extent it must in the first instance furnish the longshoremen and workmen a reasonably safe place in which to perform their work. When that is done or where it has exercised reasonable care and circumspection in that respect, it has discharged its whole duty to both the contractor and the workmen." No liability properly may rest on the ship for damages sustained by a stevedore falling through a hatchway left open by one of his fellows, *The Indrani*, 101 Fed., 596; *The Saranac*, 132 Fed., 936.

Where, however, it is shown that a defect of construction or weakness of material resulting in an injury to a workman on a vessel was the proximate cause of such injury then liability does attach to the ship and to its owner. From the outline of facts above enumerated it is evident that plaintiff fell because the plank which tilted from his weight was not a safe place for him to be in line of duty. The defendant owed to plaintiff the duty to exercise ordinary care in inspecting the coamings and covers over the hatchway in question before permitting him on the middle deck. Any such inspection would have disclosed what subsequent events demonstrated was an unsafe condition. The testimony of two of the stevedores, if true, as to the presence of a strip of wood and of wedges at the place where plaintiff commenced his fall, which they found upon inspecting hatchway No. 5 immediately after the accident, showed knowledge on the part of someone connected with the ship of the shortness of at least some of the planks constituting the hatchway covering. If such witnesses were mistaken, it nevertheless is true that the plank which tilted

either was not long enough for the purpose for which it was intended or it was out of position when the stevedores were put in possession of the ship by its master. Respecting such condition, either the agents of the defendant knew of same or in the exercise of ordinary care should have known of it before the stevedores commenced to unload cargo.

The facts set forth in the cited case of *Roymann vs. Brown, et al.*, 105 Fed., 250, are not at all in harmony with those in the case at bar. In that case it was shown that when the vessel was delivered to the stevedores for loading the hatchway covering through which decedent fell to his death was new and fitted perfectly. A steel covering over 3 feet in height surrounded the hatchway. It had a flange on the inner side upon which the hatchway covers rested. During the process of careless loading the coamings of the hatchway became bulged or bent outward opposite the cover which gave way under the weight of decedent on account of its end not resting securely upon the flange. If the coamings had not been bulged by the stevedores themselves, the cover would have been in a safe position. As the owners had furnished a reasonably safe place for the stevedores to perform their work, which place they themselves proceeded to make unsafe by their negligence in permitting slings of cotton bales to strike against the inside of the coamings in the loading, it was held that the owners properly could not be held liable for any negligence in the premises.

The case cited by defendant of the *Prins Willem II*, 128 Fed., 655 also in its facts fails to support the defendant's contention. The injured plaintiff in that cited case was employed by a contracting stevedoring firm to assist in loading a cargo of iron pipes into a steamship. The evidence showed that his work was at hatch No. 2 but that he also knew that hatchway No. 1 likewise was open. Upon completing his work, he was the first of a crew of seven to ascend from the hold up hatch No. 2. Without waiting for his companions to follow and to draw from the hold the cluster of electric lights so as to illuminate his passageway, he proceeded in the dark near to the unclosed No. 1 hatch where he had hung his coat. In the process of donning his coat, he lost his balance and fell down the No. 1 hatchway. Under such a state of facts the court found the owner not at fault in the duty of providing a safe place within which to work, and did hold that the only negligence shown was that of plaintiff himself.

In the case at bar, the evidence as above indicated shows that the defendant did not furnish the stevedores a safe place in which to work. The plaintiff when injured was in the proper discharge of his duties. The proximate cause of his injury either was a structural defect of the No. 5 middle hatch covering or negligence on the part of the de-

fendant in not having the plank which caused plaintiff to fall securely in position at the time the stevedores came aboard. The conclusion is that plaintiff has established negligence on the part of defendant.

The record does not substantiate the claim of the defendant that plaintiff became injured because of the negligence of a fellow servant. The greater weight of evidence is that no No. 5 hatch coverings on the middle deck were even touched by any of the stevedoring crew. Such a conclusion that some fellow servant may have displaced the plank that tilted necessarily must be based upon conjecture only.

The defendant also claims that the danger which resulted in plaintiff's injuries was a usual and ordinary incident to his work of a stevedore and that he assumed the risk in the usual course of his employment. Under the law, however, an employee does not assume the risk incident to the negligence of his employer unless such servant had ample knowledge of the conditions prevailing and continues in his employment with a full appreciation of the attendant danger. The conditions surrounding the No. 5 hatchway in question at the time plaintiff was directed to go upon the coverings thereof in order to procure a beam hook were not such that indicated any danger or apprehension upon the mind of any ordinarily careful and prudent stevedore. The duty of a master of a vessel to provide a safe working place and safe appliances is a positive and continuing one, and can not be delegated. Whoever had the duty resting upon him of inspecting the hatchway represented the master or owner, and his negligence in such a particular was the negligence of the master or owner. When the working place and appliances are unsafe, it is not necessary to show that they were rendered unsafe at some previous time by the act of another servant. Notice of defects and dangers are imputed to the master where they could have been discovered by a reasonable inspection or by the exercise of reasonable care, *Pacific Am. Fisheries vs. Hope* 291 Fed., 306. The doctrines of assumption of risk and contributory negligence are without application in this case.

In reference to plaintiff's damages, the evidence is definite that he sustained two broken left ribs, that his body was bruised and that some amount of pain and suffering was visited upon him. In addition, he incurred some expenses for medicines and doctor bills after his discharge from the hospital. The bill of the latter was paid by defendant. When at work he was earning 25 cents per hour. Generally his working days consisted of 8 hours each.

The plaintiff, however, claims in his own testimony that he is still suffering from the injuries received by his fall. His accident happened February 25, 1922. Shortly following his mishap, he was placed in the Ancon Hospital from which he was discharged on March 12, 1922. The hospital records presented in evidence show that he was dis-

charged 3 weeks after his accident as fully recovered and able to work except that he was afflicted with tertiary syphilis. The plaintiff disclaimed having had any previous knowledge of possessing such a disease. He testified that never has he applied for work since his fall for the reason that he has a diseased condition somewhere in his intestines from which blood passes in his bowel evacuations. His medical adviser, who was the only physician on the stand, only made a general, external examination of his patient. He never administered to plaintiff any remedies for his syphilitic plight. Purgatives and opiates to relieve pain seem to have composed his chief ministrations. He gave it as his professional opinion that the effect of the fall caused the intestinal trouble, and if plaintiff at the time had tertiary syphilis that such a malady might become active and become manifested as an intestinal disturbance. He on the other hand also advanced the statement that plaintiff's diseased intestines without any traumatism whatever could have developed from tertiary syphilis alone.

Now it is true that the negligence of defendant is not to be presumed from the happening of an accident to one of the stevedores on its ship, neither is the present diseased condition of plaintiff presumed to be the proximate result thereof. Each of the two foregoing propositions must have been established affirmatively by a preponderance of evidence by plaintiff before he may recover any damages. He has proven, as above indicated, with a sufficient degree of certainty required by the law that defendant was negligent in the particular above suggested, but the record is not persuasive that such negligence is the proximate cause of his present physical disorders.

The rule applied to a case of this kind is that defendant can not be held liable for any past or present diseased or defective condition of plaintiff's body except only that condition shown by a greater weight of testimony to have resulted from his said fall. If the preponderance of evidence establishes that his said malady that existed prior to his accident was aggravated or became more active by reason of defendant's negligence, he then is entitled to recover for such results as distinguished from his prior defective condition. As stated in the Kentucky case of *Louisville & N. Ry. Co. vs. Daugherty*, 15 L. R. A. U. S., 740, the doctrine is that:

If a person injured is feeble, sick, or diseased, and the negligence or wrongful act aggravates the illness or disease, or produces conditions that would not ordinarily or reasonably have existed or occurred except for the negligence or wrongful act and are directly attributable to it, the injured party may recover all the damages that flow from the negligence or wrongful act, including such as result from illness, sickness or disease aggravated or that are produced by it, although the person inflicting the injury may not have known at the time that the person injured was laboring under any infirmity, sickness or disease, *Lapline vs. Morgan's L. & T. Ry.*, etc., 4 So., 875 (La.) or 1 L. R. A., 378; *Brown vs. Chicago, M. & St. P. Ry.* 41 Am. Rep. (Wise), 41 or 11 N. W., 356; *Purcell vs. S. & P. Co. Ry.* (Minn.) 16 L. R. A., 203 or 50 N. W., 1034.

The plaintiff, however, is unfortunate in that the testimony fails to bring him within the benefits of the rule above stated. That he should come within its scope must have been established by some competent and creditable evidence. His own evidence on that point is a personal opinion founded only on desire and supposition. The doctor who in his treatment of many months ignored his patient's syphilitic symptoms and who permitted that condition to grow worse without any effort to remedy it can not be characterized as a convincing witness. In this connection it also may be said that it was the duty of plaintiff when informed of his said disease by the Ancon authorities to take such steps as an ordinarily prudent person in his condition would have taken to reduce his alleged damages to the minimum. It probably is true that 21 months after his accident his lamentable disease has become through lack of corrective treatment more or less chronic, even if it be assumed that the breaking of two ribs and the jolt to his body did cause increased activity of same. The trouble with this branch of the case is that the record at best merely shows that said accident may or may not have caused such a result. Such a result as heretofore stated is not to be presumed as a proximate sequence of the accident. The cause and effect must be established affirmatively. Therefore it follows that plaintiff has failed to establish that defendant's negligence was the proximate cause of any of his physical inconveniences existing subsequently to February 28, 1922. In order to conclude otherwise, one would have to resort to surmise, supposition, and conjecture. He, however, is entitled to judgment in damages against defendant for injuries to his body, for loss of earnings, and for pain and suffering. The total amount of these various items is fixed in the sum of \$350. Accordingly a separate judgment entry in his favor for said amount and costs will be entered, to which entry both plaintiff and defendant will be given an exception.

YOUNG *versus* YOUNG.

(District Court, Canal Zone, Balboa Division, December 28, 1923.)

Civil No. 584.

1. DIVORCE. DESERTION.

Where husband and wife had resided on the Canal Zone and the wife has departed from the Canal Zone and remained away for the statutory period and it appears from the proof of the husband that the wife was nagging, inconsiderate, and contemptuous, and said that she did not care for him and intended to go to the States to make her home; and this testimony of the plaintiff is directly contradicted by the defendant; and the evidence shows that her departure from the Zone was on account of ill health due to climatic

conditions followed by letters from the husband that he intended to get a position in the States and go there to live where they could be together, the court is precluded from granting the plaintiff a divorce on the ground of desertion.

2. DIVORCE. CROSS PETITION. WILLFUL NEGLECT.

Where the defendant wife files a cross petition for divorce on the ground of willful neglect, and it appears that the plaintiff husband has failed for the statutory period to furnish her with the necessities suitable to her station in life willfully, and it appears that he was able so to do, a divorce will be granted on the cross petition.

Attorney for plaintiff, *E. M. Robinson*.

Attorney for defendant, *Felix E. Porter*.

WALLINGFORD, District Judge. In this action, the plaintiff bases his petition for a divorce from his wife on the statutory ground that she has willfully deserted and absented herself from him without any reasonable cause for a period of at least 2 years.

The marriage rites between the parties were solemnized in the month of June, 1914. They have had no issue. The husband as a governmental employee became a resident of the Canal Zone in June, 1919. In June, 1920, his wife and her mother joined him in the Canal Zone, and the two parties to this proceeding lived together in this jurisdiction in the conjugal relationship until February 23, 1921. On the latter date, Mrs. Young and her mother returned to Washington, D. C., where the mother resided. The wife came the second time to the Canal Zone from Washington on September 17, 1921, and remained here some 6 weeks before returning there.

The contention of the plaintiff in substance is that, through no sins of omission or commission on his part, his wife about December, 1920, became dissatisfied with him and their surroundings, that she systematically thereafter displayed toward him a nagging, inconsiderate, and contemptuous disposition, and continued to reiterate the assertions that she did not care for him and that she wanted to return to the States in order to make her home there. That her departure from the Zone in February, 1921, coupled with her declaration that she never would return and never again would live with him as his wife, amounted to desertion, especially as at the time he made every effort to induce her to remain.

Such contentions, if established by proofs, would entitle a complaining spouse to the relief sought in this case. However, the record contains only the testimony of plaintiff himself and no other witness testified nor were there any facts or circumstances shown which tend to corroborate his representations as to desertion. The testimony of his only witness, C. L. Pulver, pertained to inconsequential matters entirely foreign to the main issue presented. In view of the testimony of the wife and of her supporting witnesses in flat contradiction of

plaintiff's testimony, it might well be said that the husband's testimony does not establish that preponderance of evidence that is required in court procedure before the relief requested properly may be accorded.

The solution of this case, so far as plaintiff's application is concerned, is without difficulty after the inspection of the several letters written by him to his wife following her departure from the Canal Zone in February, 1921, and which letters are in evidence as exhibits. Without quoting from them, it only need be said that they evidence on their face a warm affection for his wife, his own impatience to obtain a transfer so as to be constantly with her and his regret that the Zone climate is injurious to her health. From these letters it is evident that Mrs. Young left the Zone in February, 1921, solely on account of being unable to sojourn here in health because of local climatic conditions. They also establish that her departure was with the advice, desire, and assistance of plaintiff. That the two parties while together on the Zone lived at least in contentment and concord so far as external signs indicated, and that the wife's health became impaired seriously while here, are testified to by Milton S. Treadwell who with his wife saw the Young family daily. So also testified the mother of defendant who visited her daughter while on the Zone and who in addition stated that it was at the direct and repeated suggestions of plaintiff that Mrs. Young left for the States in said month of February under the assurance of her husband that he would join her there on the next Army transport.

A consideration of the plaintiff's letters in evidence induces the opinion that desertion on the wife's part has not been established. The rational conclusion therefrom is that the husband had grown weary of the matrimonial yoke, and that the ardent expressions of devotion written to his helpmate amidst tropical temperature and surroundings merely were indulged in to lull her into feelings of fancied security that she still possessed his loyalty and into the belief that his several postponements of his sailing date were forced by annoying circumstances over which he had no control.

From all of the circumstances disclosed in the record the truth appears to be that the wife did not know of any changed sentiments on the part of her husband toward her until in September, 1921, when she cabled him that she would join him in the Canal Zone on a steamer leaving a few days thereafter. She testified that she took such action because of a recent letter from her husband that he again was unable to obtain leave before the succeeding March and that another disappointing postponement of a reunion with her had been visited upon him. She therefore proposed to join him and abide with him until they could return to the States together. The wife's cable caused a reply from the husband as follows: "Do not come. No

quarters or place to stay. Letter follows." His said follow-up letter of the same date of September 10, 1921, is a complete reversal of form from its predecessors. In it upbraidings take the place of the previous phrases of affection, and direct notice is given that neither will he go to the States before the following spring nor will he receive her here as his wife.

The record shows that the cablegram and letter of September 10, 1921, were not delivered to Mrs. Young prior to sailing from the States. They were forwarded to and received by her after her arrival upon the Canal Zone. Her husband met her not at Cristobal where her steamer docked but upon her arrival at the Panama City railroad station some 48 miles away. The wife testified that the husband when called from Cristobal by long-distance telephone greeted her with such expressions as "What are you doing here?" and "What do you want?" Further upon meeting her later at the railway station that he announced that she must return on the next boat, that he would not remain in her company and that she must abide alone in a hotel in Panama City until the next available steamer left port. Such testimony, though denied by the husband on the stand, is not out of harmony with his statements in his said letter of September 10, which statements lend verification to defendant's version of his attitude and comments, and constitute a persuasive inference that she has sworn truthfully. Defendant also testified that her husband after saying he had no affection for anyone and preferred to live alone continued to avoid her, and that he notified the Hotel Tivoli that he would not be responsible for her hotel accommodations. At the end of 6 weeks, she returned to Washington, as she explains, in response to a summoning message that her mother had been seized with a serious illness.

The evidence warrants the opinion that the wife put forth efforts to preserve her home and family relations and that from no conduct shown on her part can it be inferred with reason that she ever contemplated severing those ties. Plaintiff was willing and did aid her in leaving him in the Zone at the time he claims he was deserted, which was in February, 1921. She went to Washington for her health's sake, and he persuaded her, as shown by his letters, to tarry there indefinitely in the plausible expectation that he intended to join her in the States on the next transport departing from the Isthmus.

Without further reference to the evidential matters in the record, sufficient portions thereof have been indicated to demonstrate the correctness of the above-mentioned conclusion that the plaintiff has failed to establish by a greater weight of testimony a willful desertion on the part of his wife. Therefore his application for divorce must be denied.

In this proceeding, the wife has filed a cross complaint in which she asks that a decree of divorce issue in her favor on her own application. In her testimony she states that her feelings of affection and loyalty first became impaired and then destroyed by reason of plaintiff's attitude and conduct during her last sojourn of 6 weeks on the Isthmus. Reference already has been made as to the general nature of that attitude and conduct. The wife's position is that her husband is the one and not herself who is guilty of desertion. With such a contention the preponderance of evidence and natural deductions to be drawn therefrom apparently are in accord. Even before starting for the Zone the second time in September, 1921, she was to many intents and purposes a deserted spouse though she then may have known it not. Her conduct in making the ocean journey did not rise to the degree of foolishness characterized by her husband in his last letter to her. In proceeding forthwith to the Canal Zone upon receiving word from him in September that regardless of transport facilities he proposed not to join her in the States until the following spring, this defendant was prompted to seek out her husband by those defensive and safeguarding instincts that sometimes urges to action a wife upon apprehending or realizing that the chosen pilot of her matrimonial barque is allowing it to drift upon troubled waters.

In addition to the statutory ground of desertion presented, the local law also provides that the injured wife also may base a divorce action upon the proposition that her husband has been guilty of willful neglect consisting of his willful failure for a period of 1 year or more to provide for her the necessities of life when he has the ability so to do. The wife has established that for more than 1 year preceding the filing of her cross complaint on November 22, 1923, her husband intentionally neglected to provide her with necessities suitable to her station in life from his uninterrupted salary of \$176 per month, except when urged so to do by court order. There is some testimony in the record that in February, 1921, the joint bank account of the parties of some \$400 or \$500 was surrendered by the husband to the wife, but he now is entitled to little credit on that account in view of the uncontradicted testimony of the wife and her mother to the effect that the wife in 1919 received in cash from the estate of her deceased father \$520 from which the husband later in the same year received \$275 for his personal needs preparatory to starting for his Canal Zone assignment. At any rate the persuading evidence is that the entire bank account was exhausted some months ago, and that the wife now has no source of income other than what she may be able to earn by her own labors. The conclusion of the whole matter is that the wife is the one who has established a statutory right to a divorce.

Accordingly a decree may enter dismissing the husband's application and allowing a divorce to the wife on her cross complaint together with permanent alimony while remaining unmarried, or until the further order of court, in the sum of fifty dollars (\$50) each month payable, unless the parties otherwise mutually agree, on the 28th day of each month beginning December 28, 1923.

GOVERNMENT *versus* DIAZ.

(District Court, Canal Zone, Balboa Division, January 31, 1924.)

Criminal No. 2036.

1. CANAL ZONE. SOVEREIGNTY OVER.

The treaty under which the United States acquired the Canal Zone vested in the United States all right, power, and authority which it would possess as the sovereign thereof to the exclusion of the exercise of acts of sovereignty thereover by the Republic of Panama. (Citing *Wilson vs. Shaw*, 204 U. S., 24.)

2. ALIENS. DEPORTATION. VIOLATION OF DEPORTATION ORDER.

A citizen of Panama, although born in the territory now embraced in the Canal Zone prior to the date of the treaty between the United States and Panama, may be lawfully deported from the Canal Zone for a statutory cause. After such deportation his voluntary return to the Canal Zone is a violation of the deportation order, subjecting him to punishment.

For the Government, *G. H. Martin*, District Attorney.
Attorney for defendant, *A. B. Thompson*.

WALLINGFORD, District Judge. In reference to this case of Reginald Diaz, the proposition raised by the motion of defendant is that, having been born in territory embraced within the Republic of Panama though not within the limits of the Canal Zone, he can not for said cause now be deported lawfully from the Canal Zone to the Panamanian jurisdiction. His counsel does not dispute the proposition that inherent in the right of the Government to deport is also the right to punish any offender who may violate the terms of the deportation order. His contention is solely that the Government, while possessing the power to deport all other undesirables, does not have the right and lawful power to deport an undesirable if such a one happens to be a native and citizen of what is now Panamanian territory exclusively. Both reason and authority are against any such proposition. The treaty under which the Canal Zone was acquired vested in the United States all right, power, and authority within the Zone which the United States would possess and exercise if it were the sovereign thereof to the entire exclusion of the exercise by the Republic of Panama of any such sovereignty. In view of such a complete and comprehensive grant the United States Supreme Court in the case of *Wilson vs. Shaw*, 204 U. S., 24, did conclude that any

contention of imperfection of title of the United States to Canal Zone land was hypercritical. The defendant in the first instance properly was deported from the Zone. He returned voluntarily in violation of the terms of a valid order of expulsion. He therefore has rendered himself liable to the penalties imposed by the law for so doing. His motion for discharge accordingly is overruled. An exception to the defendant is granted.

DIAZ *versus* PATTERSON.

(District Court, Canal Zone, Balboa Division, March 15, 1924.)

Civil No. 199.

1. INTEREST. MONEY DEPOSITED IN COURT.

Where in the course of litigation money is deposited in court subject to the order of court, interest thereon is not recoverable during the time prior to final decree disposing of the fund in the absence of stipulation between parties.

2. COSTS. ORIGINAL DOCUMENTS.

Under C. C. P., Section 531, no costs may be taxed or recovered for the production of original instruments offered and received in evidence.

3. COSTS. WITNESS FEES AND MILEAGE.

The provisions of C. C. P., Section 817, providing that witness fees and mileage may be allowed on the witness filing with the clerk an affidavit showing his attendance, is directory only, and in an equity case such fees and mileage may be allowed without the filing of such affidavit.

Attorneys for plaintiff, *Harmodio Arias* and *C. P. Fairman*.

Attorneys for defendant, *Todd* and *MacIntyre*.

WALLINGFORD, District Judge. In November, 1914, Guillermo Patterson presented to the Joint Commission his claim for the value of certain lands expropriated by the United States Government. The plaintiff, with others, presented to the same Commission claims for a portion of the same lands.

Before the Joint Commission made any finding as to the value of said real estate, the above-named plaintiffs on November 23, 1917, instituted this suit against Patterson to quiet title in the lands in dispute. Before said suit passed to a decree, the Joint Commission in January, 1919, fixed the value of the two parcels of property in dispute at \$3,000 and \$23,160, respectively. Under the authority given the Commission by law, and especially as authorized by section 113 of the Code of Civil Procedure, the Commission on January 28, 1919, deposited with the clerk of this court the said sum of \$3,000 and on January 31, 1919, the further sum of \$23,160, aggregating in all \$26,160.

Under a stipulation entered into by all of the parties in the month of November, 1920, it was agreed that the funds on deposit with the clerk should be deposited in a savings account of a bank at 4 per cent

interest. The court approved said stipulation and ordered that "all interest earned by said money while so deposited shall be added to the principal sum, and shall be finally distributed as part of said fund in accordance with the final order of distribution." Under this order the cash fund of \$23,160 was deposited in bank on November 19, 1920, at 4 per cent interest, and the cash sum of \$3,000 was similarly deposited on June 8, 1921.

A final decree in this cause was rendered by this court on May 27, 1921, in which the defendant, Guillermo Patterson, was awarded said entire sum of \$26,160 and costs, together with all interest thereon accrued and which hereafter may accrue. An appeal by plaintiffs was taken from said decree and plaintiffs' \$4,000 appeal bond was approved June 4, 1921, conditioned that the plaintiffs would prosecute their appeal to effect, and answer all damages and costs if they failed to make their appeal good. The Supreme Court of the United States affirmed the decision of this court, and in accordance with the mandate now filed with the clerk the entire fund, less an amount withheld pending a settlement for a claim for an attorney fee lien and an amount to satisfy costs, already has been delivered to the defendant under court order.

This matter now comes on for hearing upon the application of the defendant, Patterson, for the taxation of his itemized costs in the total sum of \$829.45 plus his claim for interest on the judgment from the time that the said funds were deposited in the registry of this court by the said Joint Commission, which amount of interest he asserts is \$7,961 to February 19, 1924, at which time distribution of the fund was made. Therefore, as interest and costs, the said Patterson is asking that the total amount of same be fixed in the sum of \$8,790.45. The plaintiffs by their counsel have appeared in open court and are resisting the merits of this application. The items contained in the defendant's application to which objections are interposed are grouped and are disposed of in the following manner, viz.:

First: In respect to the claim of \$7,961 and interest, the general rule of law applicable thereto is that where a fund in litigation is deposited in court or is deposited subject to its order, the interest is not recoverable thereon, in the absence of a stipulation or agreement to the contrary, during the time prior to final decree that it remains so deposited. Such is the pronouncement made in the text in 22 Cyc., 1559, and in the authorities therein cited.

In *Bowman vs. Wilson*, 12 Fed., 864, the statement in respect to interest made is that:

Interest is allowed on the ground that the debtor is in default and has the use of claimant's money. It never is allowed where, by the order of a court of competent jurisdiction or by the interposition of the law or the act of the creditor, payment of

the debt has been prevented. During the continuance of such prevention the interest does not run. If a fund is in the custody of the law or in the possession of a court and can not be paid out without the order of such court, ordinarily it does not bear interest.

The case of *Van Gordon vs. Ormsby, et al.* (Iowa), 15 N. W., 306, was one in which the defendant had deposited with the registrar of court certain cash funds of plaintiff which were claimed by certain intervenors. The termination of that suit resulted in the defeat of the intervenors and in plaintiff recovering the entire fund. Plaintiff thereupon asked judgment against the intervenors for interest from the time the defendants deposited the funds with the clerk to the time in which under court order they received from the clerk the proceeds of the judgment. The Iowa court stated that:

The only question involved in the case is whether intervenors should be charged interest upon the sum which by their procurement remained in the hands of the clerk subject to the order of court. We know of no rule of law which justified the recovery of such interest. * * * It does not appear that the intervenors acted otherwise than in good faith, and we do not think that they should be made to pay interest as punishment simply because they failed to establish their right to the money.

It would serve no especial purpose to cite further from the other numerous authorities on this proposition. In this long and expensive litigation it properly can not be inferred from the record that the plaintiffs have acted otherwise than in good faith in pressing their claim to this fund through several tribunals to the court of last resort sitting at Washington.

From the above statement of facts, it appears that the said item of \$3,000 was not deposited in bank at interest until June 8, 1921, which was a subsequent date to the decree of this court which was entered in this case on May 27, 1921. However, the above item of \$23,160 was deposited in said bank on November 19, 1920. According to the statement furnished this court by said bank the said fund on the date of the decree of May 27, 1921, under its bank rules had earned as interest the sum of \$377.68. Therefore, under the stipulation of the parties and the court order based thereon the defendant, Patterson, was entitled on the date of said decree of May 27, 1921, to the judgment of \$26,160 plus the accrued bank interest of \$377.68, aggregating \$26,537.68, with 6 per cent interest on said total sum from said date to February 19, 1924, when he received said fund, amounting to \$4,343.23, aggregating \$30,880.91. Any bank interest accumulated on the fund since the date of said decree is to be applied on the amount of interest for which the plaintiffs under this ruling are chargeable.

This conclusion that the fund or judgment of \$26,537.68 should draw 6 per cent interest from the date of the rendition thereof, even

though the decree did not directly so specify, is in harmony with the great weight of authority and is in direct compliance with the provisions of section 472 of the Code of Civil Procedure which provides that interest shall be calculated upon all judgments from the date of rendition until the same are paid at the rate of 6 per cent per annum. The reference in the decree to all interest then accrued on said fund, and which hereafter may accrue, evidently pertains to the 4 per cent bank interest on the fund which had been deposited in bank by order of court under stipulation of the parties prior to the date of the judgment. Therefore, the order of the court is, that the defendant on his judgment is allowed interest in the sum of \$4,343.23.

The defendant's claim for costs on account of some 26 different itemized exhibits procured by him and offered in evidence aggregates \$234.80. Some of these exhibits pertaining to land titles were in the possession of the defendant as his property long prior to the adoption of the Panama Canal Act of August, 1912, which authorized the expropriation of the real estate in controversy, while other exhibits were procured by defendant for presentation either to the Joint Commission or to this court as evidence respecting defendant's title. According to the provisions of section 531 of the Code of Civil Procedure, no court costs may be taxed for exhibits in the form of original documents, deeds or papers introduced in evidence, but the expense for obtaining official copies of same properly may be taxed as costs if they are used as exhibits. It therefore follows that Mr. Patterson properly is entitled to recover his costs for such official copies of documents, deeds, or papers used by him before the Joint Commission or this court as exhibits which may have been procured by him subsequently to the month of August, 1912, for the purposes indicated. Counsel acting jointly have agreed on almost all of the exhibits listed in defendant's motion to tax costs, and have disagreed on only a very few items thereof amounting to a few dollars only. These few disputed items have been examined and determined. The order in reference to all costs allowed for said exhibits is that \$154.90 be taxed as itemized in the following calculation, viz.:

Exhibit A of 11 pages.....	\$10.40
Exhibit A-1.....	11.30
Exhibit A-2.....	15.80
Exhibit B-1, of \$5.80 plus \$3.90 plus 40 cents.....	10.10
Exhibit C.....	4.40
Exhibit D.....	16.10
Exhibit G.....	6.10
Exhibit H.....	4.90
Exhibit I.....	4.60
Exhibit J.....	4.40
Exhibit K.....	4.90
Exhibit L.....	2.20

Exhibit M.....	\$6.10
Exhibit N.....	5.60
Exhibit O.....	7.10
Exhibit P.....	2.00
Exhibit Q.....	2.20
Exhibit R.....	2.20
Exhibit S.....	2.00
Exhibit T.....	2.20
Exhibit U.....	2.20
Exhibit V.....	5.60
Exhibit Y.....	3.20
Exhibit W.....	1.00
Exhibit Z.....	18.30
Total allowed.....	<u>\$154.90</u>

In defendant's claim for costs the following additional items are allowed:

Item 1. Cost of Paredes deposition appearing on p. 613 of the printed transcript of record.....	\$2.50
Item 2. Certified copy of judgment of Patterson <i>vs.</i> Gomez, appearing on p. 779 of said transcript.....	1.70
Item 3. Stenographic fee paid Mr. Dudak.....	137.50
Item 4. Cost of translation of exhibits appearing on pp. 959 to 1116 of said record, being 158 pages.....	79.00
Item 5. Fees advanced for 24 witnesses.....	24.00
Item 6. Mileage allowed 24 witnesses at 10 cents.....	2.40
Item 7. Defendant's answer.....	4.00
Item 8. Attendance fee.....	10.00
Item 9. Service of subpoena.....	2.05
Total.....	<u>\$263.15</u>

In reference to the items for witness fees and mileage, it is provided by section 817 of the Code of Civil Procedure that such fees "shall be allowed on the affidavit of the witness stating the number of days he has attended, and the amount of mileage to which he is entitled." No such affidavit was ever filed in respect to said witnesses. In this equity proceeding the said provision of the Code in respect to the requirement of an affidavit being filed is deemed merely directory and not mandatory. The witnesses did appear and did testify and the defendant has made a showing that he has advanced fees due to them, respectively. The principles of equity, therefore, appear to require that at least he should be allowed to recoup to the extent of the amount above indicated.

In the claim for costs to be taxed are the items \$87.20 for printing briefs in the Circuit Court of Appeals, and \$79.25 for printing briefs used in the United States Supreme Court. These two items are properly included as valid items of costs but at present there is no showing on file indicating that the items were taxed as costs in the respective

upper courts or that the same had ever been paid by the plaintiffs. The two said items, aggregating \$166.45, are allowed provisionally as costs to be taxed but the clerk is requested to retain said two amounts out of the proceeds of the cash bond on file until the defendant does make a documentary showing that the said items had in fact been advanced by him and are unsatisfied of record in the two upper courts, respectively.

The remaining items of costs heretofore not referred to in this order are disallowed, which disallowance amounts to the total sum of \$165.05, itemized as follows:

Item 1. Transportation expenses and refreshments on a tour of inspection of the lands in controversy.....	\$36.00
Item 2. Claim for 6 per cent interest on \$137.50 advanced to Mr. Dudak..	41.25
Item 3. Sundry surveying services of O. E. Malsbury.....	70.00
Item 4. One witness fee—difference between claim for 25 witness fees and 24 witnesses listed in claim.....	1.00
Item 5. Difference between \$12.95 asked as mileage and \$2.40 above allowed.....	10.55
Item 6. Defendant's copy of the decree of the Appellate Court.....	5.00
Item 7. Amount given by defendant to his New Orleans attorney to pay to the clerk of court.....	1.25
Total amount of items disallowed.....	<u>\$165.05</u>

In reference to the foregoing disallowed items of \$165.05, it is sufficient to say that there can only be allowed court costs in an action such as are authorized in the provisions of section 531 of said Code of Civil Procedure at the time of trial, and no effort was made to procure any special order of court in approval of any of the foregoing disallowed items. Hence, properly, they are not now recoverable.

A recapitulation of the foregoing rulings is as follows:

RECAPITULATION.

Total amount of interest claimed by defendant on judgment to February 19, 1924.....	\$7,961.00
Plus court costs.....	829.45
	<u>\$8,790.45</u>
Amount allowed in this order to defendant as interest on the judgment of \$26,160 plus its 4 per cent accumulation, \$377.68, as of date of May 27, 1921, to February 19, 1924..	\$4,343.23
Allowed on court exhibits.....	154.90
Allowed for miscellaneous items as listed in exhibits which are summarized above.....	263.15
Allowed provisionally for printing of briefs.....	166.45
	<u>\$4,927.73</u>
Disallowed items.....	<u>3,862.72</u>
	<u>\$8,790.45</u>

The total amount of interest and costs to which the defendant is entitled is \$4,927.73, for which the cash bond of plaintiffs is liable, less,

however, any credit on same in the form of cash paid to the defendant as the proceeds of the 4 per cent interest accumulations paid by the bank on the funds deposited with it since May 27, 1921, to date.

It therefore is ordered that the clerk record as taxable costs in favor of defendant the sum of \$584.50 as above itemized. Defendant therefore is entitled to recover his judgment of \$26,537.68 plus \$4,343.23 as interest and plus \$584.50 as costs taxed, aggregating in all \$31,465.41. Said clerk also is directed to disburse the proceeds of the said \$4,000 cash bond less the item of \$166.45 as follows:

To O. E. Malsbury in settlement of his part of bill. \$100.00
To defendant, the amount due him as provided in this order, and to plaintiffs or their attorney of record the balance of the \$4,000 and its interest accumulations that may remain in his possession after making the two foregoing disbursements.

To all of which both the plaintiff and the defendant are given an exception.

GOVERNMENT *versus* OBSITNIK.

(District Court, Canal Zone, Cristobal Division, November 14, 1924.)

Criminal No. 1477.

1. CANAL ZONE. IMMIGRATION REGULATIONS. RETURNING TO CANAL ZONE AFTER DEPORTATION.

Under the Act of Congress, approved August 16, 1914 (39 Stat., 528; T. & A., 131), the President has power to make, alter or amend regulations touching the right of any person to enter, remain upon, or pass over the Canal Zone. Under such authority the President may prohibit a person once lawfully deported from entering, remaining on, or passing over the Canal Zone, and if so prohibited a violation of such prohibition would subject the offender to criminal responsibility under the provisions of section 10 of the act.

2. CANAL ZONE. REGULATIONS.

The Executive Order of February 6, 1917, as amended by the Executive Order of September 13, 1923, made pursuant to such act, contains no clause prohibiting one lawfully deported from the Canal Zone as an undesirable and one likely to become a public charge, from returning to the Zone, and in the absence of such prohibition it is not a criminal act so to return. (This does not apply to a case falling within the provisions of the Executive Order of September 25, 1913. [E. O., 151.])

3. CRIMINAL LAW. PRESUMPTIONS.

Criminal law can not be created by presumption or implication. Criminality must be based upon positive provisions of statute or ordinance and the court can not by construction make that a crime which is not declared by statute or ordinance to be a crime.

Attorney for the Government, *J. J. McGuigan*, Assistant District Attorney.

Attorney for defendant, *W. C. Todd*.

MARTIN, District Judge. The information against the defendant charges, in substance, that on the 17th day of July, 1924, the defendant was duly deported from the Canal Zone as an undesirable person and as one likely to become a public charge, and that thereafter on the 3d day of September, 1924, the defendant willfully and unlawfully returned to and entered upon the Canal Zone without permission from the immigration officers thereof, in violation of the provisions of the Executive Order of February 6, 1917.

The defendant interposes a demurrer challenging the jurisdiction of the court over the subject matter of the action, and the sufficiency of the facts stated in said information to constitute a public offense.

A consideration of the issues raised by the demurrer requires an examination of the Act of Congress, approved August 21, 1916 (39 Stat., 528; T. & A., 131), and the Executive Order of February 6, 1917 (E. O., 220), as amended by the Executive Order of September 13, 1923 (E. O., 337).

Section 10 of the Act of Congress, approved August 21, 1916, provides:

The President is hereby authorized to make rules and regulations, and to alter or amend the same from time to time, touching the right of any person to enter or remain upon or pass over any part of the Canal Zone. * * * Any person violating any of such rules and regulations shall be guilty of a misdemeanor, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding \$500, or by imprisonment not exceeding a year, or both, in the discretion of the Court.

Under the provisions of this section it is competent for the President to make a rule or regulation prohibiting a person deported from the Canal Zone, for whatever cause, from thereafter returning thereto; and a violation of such regulation would consequently carry with it criminal responsibility, as provided in said section 10.

The question for determination is whether the Executive Order of February 6, 1917, as amended by the Executive Order of September 13, 1923, contains any rule or regulation prohibiting a person deported from the Canal Zone as an undesirable person and one likely to become a public charge, from thereafter returning to the Canal Zone.

It is provided, in substance, in the Executive Order referred to, that the Governor of The Panama Canal may exclude, or cause to be excluded, certain classes of persons, but there does not appear to be in either of said Executive Orders any provision whatsoever prohibiting a deported person from again returning to the Canal Zone and seeking entry therein. The laws of the Canal Zone do provide that where a person is convicted of a criminal offense and is deported because thereof, and thereafter returns to the Canal Zone, that such an act is a

criminal offense; but there has not been called to the attention of the court nor has the court been able to find any provision in the laws of the Canal Zone prescribing a criminal responsibility for the reentry of a person who has previously been deported merely as an undesirable or as a person likely to become a public charge.

Criminality can not be sustained upon presumed or implied provisions of the law. The rule seems to be of universal acceptance that an act not prohibited and made punishable by statute or ordinance can not be punished as a crime, and the court can not by construction make that a crime which is not so prohibited.

16 C. J., 64.

U. S. *vs.* Dietrich, 126 Fed., 676.

U. S. *vs.* Sandefuhr, 145 Fed., 49.

U. S. *vs.* Keitel, 157 Fed., 396.

Ex parte Rickey, 100 Pac., 134.

The Sandefuhr case is particularly pertinent. The indictment charged the defendant with having knowingly and unlawfully shipped a keg containing 15 gallons of spirituous liquors, the brands and marks *thereon not being visible*. Section 3449, R. S., provided that whenever a person ships, transports, or removes any spirituous liquors under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, he shall be criminally responsible. The Secretary of the Treasury by regulation provided that casks and packages in which distilled spirits were shipped or transported must *visibly* bear the stamps, marks, and brands required by law, so that the same might readily be examined by the revenue officers. In deciding that the indictment did not charge a crime, the court uses the following language:

There is nothing in the statute which makes the failure to put any *visible* marks or brands on the package containing the liquor an offense. * * * If Congress had made the violation of this regulation a criminal offense the indictment could be sustained.

In the instant case the President could have made a regulation prohibiting the return to the Canal Zone of a person deported therefrom on the grounds stated in the information, and had such orders contained such a prohibition, then this information would be sustained; but the Executive Orders, not having made such a prohibition, the court is powerless to construe them as if such prohibition had been made.

The demurrer is sustained. The defendant is ordered discharged and his bail exonerated.

MULDOON *versus* MULDOON.

(District Court, Canal Zone, Balboa Division, December 27, 1924.)

Civil No. 671.

1. COMMON LAW. STATUTORY CONSTRUCTION.

The common law, as that term is used and understood, is not in force in the Canal Zone in the sense that a statute providing for substituted service of process can be said to be in derogation of the common law.

2. PROCESS. SERVICE BY PUBLICATION. STATUTORY CONSTRUCTION.

Statutes providing for substituted service of process like section 15 of the Act of Congress, approved September 21, 1922 (Divorce Code), will be strictly construed; and where the proceedings fail of strict compliance with statutory requirements the service of process will be quashed in an appropriate proceeding.

Attorney for petitioner, *E. M. Robinson.*

Attorney for defendant, *Felix E. Porter.*

MARTIN, District Judge. The petition in this action, unverified, was filed in the office of this court September 8, 1924, wherein the plaintiff seeks a divorce from the defendant and the custody of two minor children. The summons was issued thereon, September 8, 1924, and was returned by the marshal of said court, September 11, 1924, reciting in substance that the defendant can not be found within the Canal Zone. September 11, 1924, an affidavit made by the plaintiff was filed in the clerk's office, reciting "that she is the plaintiff in suit No. 671, wherein Albert C. Muldoon is defendant; that she is a resident of Ancon, Canal Zone, and has been a resident thereof for legitimate occupation and employment since the year 1917, and that the defendant, Albert C. Muldoon, went out of the Canal Zone during the year 1917, and has not returned to the Canal Zone and that legal process can not be had on said Albert C. Muldoon in said Canal Zone, and that his present address is Vertudes Number 2, Havana, Cuba." October 9, 1924, the clerk of said court made and filed his certificate, which, after reciting the issuance of summons September 8, 1924, and its delivery to the marshal of the Canal Zone for service and that on September 11, 1924, said summons was returned by said marshal showing that the defendant can not be found in said Zone, proceeds to state: "That subsequent thereto, to wit, on the 20th day of September, 1924, I caused to be published in the *Independent*, a reliable newspaper with a general circulation and having an English section and published in the City of Colon, Republic of Panama, there being no newspaper published in the Canal Zone, a notice to the said defendant of the pendency of this action, and that said notice, a copy of which is attached hereto and made a part hereof, was published in said newspaper once each week for three consecutive weeks, to wit,

on September 20, 27, and October 4, 1924, respectively." Attached to this certificate made by the clerk are copies of "the *Independent*, a weekly journal devoted to general interests," dated September 27, 1924, and October 4, 1924, showing that the same is published at Colon, R. P., and that such issues are volume 14, respectively numbers 39 and 40, and in each of which the notice of pendency of suit in this case appears.

The certificate of the clerk further shows that on September 29, 1924, he sent to the defendant by mail a copy of said notice, addressed to Albert C. Muldoon, Vertudes No. 2, Havana, Cuba, the residence of the defendant stated in said affidavit. The notice so published requires the defendant to appear and answer said complaint on or before the 22d day of December, 1924.

December 19, 1924, the defendant appeared specially and filed a motion to quash the service of the summons upon the defendant and to dismiss the petition of the plaintiff herein for lack of jurisdiction of the person of the defendant upon the following grounds: (First) That the plaintiff has failed in the publication proceedings to comply strictly with the divorce law relating to publication of summons against this defendant. It appears, from the copies of the *Independent* attached to the certificate of the clerk, that they are published one section in English and one section in Spanish, and the notice in question appears in the English section. (Second) That the divorce law of the Canal Zone, act of September 21, 1922, requires publication of the notice of the pendency of the action "in the nearest reliable newspaper with a general circulation published in the Republic of Panama," and that the notice as published in the *Independent* was not published in the nearest reliable newspaper of general circulation in the Canal Zone, and that the publication of such notice in the *Independent* published in Colon, R. P., is at the greatest distance from this court of any city in said Republic in which a newspaper having a section in the English language, is published. This action is pending in the Balboa Division of the District Court and the District Court for such division holds its sessions at Ancon, and the court will take judicial notice that the City of Colon, in the Republic of Panama, is distant from Ancon approximately 47 miles. It is a matter of common knowledge, of which the court will take notice, that there is another newspaper of general circulation in the Canal Zone having an English and a Spanish section, viz., the *Star & Herald*, published at Panama in the Republic of Panama, approximately one mile distant from the place where the sessions of the Balboa Division of the District Court are held.

It is suggested in the motion of the defendant that the statute in question providing for publication against an absent defendant is in

derogation of the common law; but the common law as that term is usually understood is no part of the law of the Canal Zone and the statute in question is not, therefore, in derogation of the common law. It is, however, a rule of universal application in all the courts of Continental United States, that statutes providing for substituted service in divorce and other actions upon absent defendants must be strictly and literally followed or the court does not acquire jurisdiction to make a decree which will bind the defendant in the action thus served with process constructively. Such rule should be followed by this court in such cases.

The applicable part of the divorce law is as follows:

Section 15. PROCESS. SERVICE. NOTICE BY PUBLICATION. (a) The clerk of the district court shall issue a summons for the defendant to appear and answer, which summons shall be personally served on the defendant, if the defendant is found on the Canal Zone, by delivering a true copy thereof to the defendant in person.

(b) When any petitioner shall file in the office of the clerk of the district court an affidavit showing:

(1) That the husband *and* wife have their legal domicile in the Canal Zone and that the defendant has gone out of the Canal Zone and *willfully refuses to return*, so that process can not be personally served upon him or her;

(2) When such affidavit states the present place of residence of the defendant, if known, * * * the clerk shall cause publication to be made in some newspaper published in the Canal Zone, and if there is no newspaper published in the Canal Zone then in the *nearest reliable newspaper* with a general circulation published in the Republic of Panama and printed in English or having an English section or edition, containing notice of the pendency of such suit, the names of the parties thereto, the time and place of the return of the summons in the case; and he shall also, within 10 days after the first publication of such notice, send a copy thereof by mail addressed to the defendant at the last known place of residence stated in the affidavit. The certificate of the clerk that he has sent such notice shall be evidence thereof.

It was suggested in the oral argument upon this motion that if the affidavit of the plaintiff for procuring publication of the summons in this action was defective it might be aided by the allegations of the plaintiff's petition treated as an affidavit. This, however, can not be done in the instant case for two reasons, viz.: (First) The petition is not verified and can not therefore be treated as an affidavit; (Second) There are no allegations in the petition which in any manner, aid the affidavit.

Examining the affidavit of the plaintiff herein quoted for the purpose of determining whether it complies with that portion of the divorce law herein quoted, the court is of the opinion that the affidavit is deficient in two important jurisdictional particulars: (First) There is no statement in the affidavit, as required by subsection (b) of section 15 above quoted, "that the husband *and* wife have their legal domicile in the Canal Zone." The statement is that "she (the plaintiff) is a

resident of Ancon, Canal Zone, and has been a resident thereof for legitimate occupation and employment since the year 1917." There is not to be found in the affidavit any statement that the defendant ever had a legal domicile or residence in the Canal Zone. For aught that appears in the affidavit he may have been here merely on a visit when, as stated in the affidavit, he "went out of the Canal Zone during the year 1917." (Second) There is no statement in the affidavit "that the defendant has gone out of the Canal Zone *and* willfully refuses to return, so that process can not be personally served upon him." The affidavit does state that the defendant went out of the Canal Zone during the year 1917 and has not returned to the Canal Zone and that legal process can not be had on him in the Canal Zone, but this is not the equivalent of saying, as the statute requires, that he "has gone out of the Canal Zone *and willfully refuses to return*, so that process can not be personally served upon him."

Where publication is relied on to give the court jurisdiction the affidavit for publication is a jurisdictional matter. It must comply literally with the statute relating thereto. *Cordrey vs. Cordrey*, Okl. 91 Pac., 781. *Hinkle vs. Lovelace*, Mo. 102 S. W., 1015; s. c. 11 L. R. A. N. S., 730. *Cheeley vs. Clayton* 110 U. S., 701.

It is true, as stated in *Thompson vs. Thompson* 226 U. S., 551 at 556, that, where the affidavit used as the basis for an order of publication is defective, not in omitting to state a material fact but in the mode of stating it or in the degree of proof, the resulting judgment even though erroneous and therefore voidable by direct attack, can not be said to be *coram non judice* and therefore void on its face; but as shown by the authorities above cited, especially *Cheeley vs. Clayton* that by failure to observe strictly the provisions of the law upon which jurisdiction is obtained by constructive service, the court does not acquire jurisdiction. It is, therefore, incumbent upon the court in this case to hold that the affidavit in question is lacking in essential statements required by the divorce law, and that such defective affidavit can not be made the basis for a claim that this court has jurisdiction in the case because of constructive service.

Having determined that the affidavit filed in this case is insufficient in substance to warrant constructive service by publication, it is not necessary to and the court does not decide whether the publication in this case was in the "nearest reliable newspaper."

The motion, in so far as it asks for the quashing of the service of summons or notice of pendency of the action by publication in this action, will therefore be sustained, and the quashing of such service is ordered. Leave is granted to the plaintiff to file a new affidavit and procure service by publication which will be in conformity with the law.

GOVERNMENT *versus* GARCIA.

(District Court, Canal Zone, Cristobal Division, January 10, 1925.)

Criminal No. 1489.

1. CRIMINAL LAW. LARCENY. *CORPUS DELICTI*.

In a larceny case, the *corpus delicti* is the felonious taking of the property of another, and this may be proved by circumstantial evidence.

2. CRIMINAL LAW. LARCENY. *RES GESTAE*. DECLARATIONS OF DEFENDANT. EVIDENCE.

Declarations made by the defendant at the time of the transaction and as a part thereof are a part of the *res gestae* and competent for the purposes of establishing the truth of such statements, especially when made in the presence of the defendant and not denied by him.

3. LARCENY. PROOF OF. EVIDENCE.

Where it appeared that the owner of the property and the defendant were sailors on board a vessel and that as defendant left the vessel with a bundle of clothing under his arm the owner of the property rushed from the vessel claiming that his property had been stolen, and the defendant when followed by the owner and a policeman dropped the bundle of clothing near the gutter and that the defendant, when accused of having stolen the property, claimed that he got it out of a water-closet on board the vessel and stated that he knew the property belonged to the owner who claimed it, Held, that the proof was sufficient to establish the *corpus delicti* even though the owner of the property was not present and did not testify.

For the Government, *J. J. McGuigan*, Assistant District Attorney.
Attorney for defendant, *W. C. Todd*.

MARTIN, District Judge. The facts in this case appear from the record to be substantially as follows: On the early morning of November 30, 1924, the *Alvarado*, a steamship, was lying at the dock at Cristobal, in the Canal Zone, and about 5 o'clock in the morning a policeman saw one Homero Chiappe rush down the gangplank from the vessel to the dock, waving his hands and saying that someone had stolen his property. Chiappe indicated the direction in which the person who had stolen the property had gone, and the policeman, in company with Chiappe, followed this person a short distance when they saw this person drop a bundle of clothing near the gutter. On coming up to the person in question, he was found to be the defendant in this case. He was charged by Chiappe with having stolen his property from the ship and the defendant answered something in Spanish, just what, the evidence does not disclose. The defendant was then taken by the police officer to the police station. Chiappe accompanied them. There, in the presence of the defendant, Chiappe again charged the defendant with having stolen his property and identified the property, which has been offered in evidence in this case as exhibits, as his property, and a suit of clothes which were afterwards returned by the police to Chiappe on his sailing for New York.

It appears that Chiappe and the defendant were fellow seamen on board the *Alvarado* at the time she came into Cristobal Harbor. It does not appear from the record that at any time when the defendant was questioned about this matter that he denied having stolen it. He did admit to the police officers, who were witnesses in this case, that he knew that the property was Chiappe's and that he found it in a toilet on board the vessel. The value of the property taken is considerably in excess of \$50, probably \$75 to \$80 in value. Chiappe, as shown by the record, a short time after this transaction sailed for the port of New York on the S. S. *Alvarado*, has not returned to the Canal Zone and was not a witness in the case.

Upon this record it is contended by the defendant in this case that the *corpus delicti* has not been proven, and that the defendant can not, therefore, be lawfully convicted of the crime charged.

The declarations of Chiappe made to the police officer upon the dock may properly be considered a part of the *res gestae* and competent for the purpose of establishing the truth of such statements, especially in view of the fact that they were made in the presence of the defendant. 16 *Corpus juris*, page 576. Whether or not these declarations of ownership and of theft were assented to by the defendant at the time, or denied, the record does not disclose, for the answer of the defendant was in Spanish which the witness testifying thereto did not understand, but it is significant in connection with Chiappe's declarations, that the defendant was taking property away from the locality of the ship which Chiappe claimed to be his, and that very shortly thereafter the defendant admitted that he had found the property in a toilet on the ship, had taken it therefrom and that he knew it was Chiappe's property.

There is thus presented the question whether or not the *corpus delicti* has been sufficiently proven in this case to warrant the court in finding the defendant guilty. In a larceny case, the *corpus delicti* is the felonious taking of the property of another, and this may be proved by circumstantial evidence. (Underhill Criminal Evidence, 3d Ed., p. 658 and cases there cited.) In the absence of the owner of the property, nonconsent of the owner may be proved by circumstantial evidence if the circumstances proven exclude every reasonable presumption that the owner consented. (Underhill Criminal Evidence, 3d Ed., p. 665.) The fact that Chiappe, immediately after the alleged theft in this case, came off the *Alvarado* claiming that his property had been stolen and pointing at the defendant as the man who had committed the theft, is so closely related in time to the transaction and is of such a nature as to constitute a part of the *res gestae*, and such facts are circumstances tending to show nonconsent. (Underhill, *supra*, p. 665.)

The court is of the opinion that the circumstances proven in this case, taken in connection with the admissions and statements of the defendant, are sufficient to establish the ownership of the property, the taking thereof and the nonconsent of the owner thereto; that the *corpus delicti* has been established.

Some of the cases supporting the foregoing opinion are enlightening; see:

State *vs.* Scott, Wash. 150 Pac., 423.

Groover *vs.* State, Fla. 26 A. L. R., 373 and 380.

Jackson *vs.* State, Okl. 139 Pac., 324.

George *vs.* U. S., Okl. 97 Pac., 1052. 7 R. C. L., pp. 774-5-6.

People *vs.* White, Cal. 151 Pac., 1147.

In these cases the general rule is laid down that, while the *corpus delicti* can not be established solely by the extra judicial admissions or confessions of the defendant, yet such admissions may be considered along with other facts and circumstances in the case to establish the *corpus delicti*. The case of George *vs.* the United States, states the rule in the following language:

Absolute, positive evidence is not necessary to establish the *corpus delicti* of a crime but proof thereof may be made by circumstantial evidence; and if there is a reasonable inference, deducible from the evidence, of the existence of the *corpus delicti*, it is the duty of the court to submit the question of the sufficiency and weight of the evidence tending to support that inference to the jury.

And that rule was applied in that case on a state of facts substantially as follows: George was charged with the theft of a horse, the property of John Adkins; Adkins was not present at the trial and his whereabouts was unknown. Shortly after the theft of the horse Adkins appeared at the home of one Riddle, inquiring for the horse and Riddle went with Adkins in search of the horse. They found in some woods where a horse had been roached. The mane which had been cut off was black. They then went into the adjoining county of Pott, to the home of one Walter Vale; Vale was not at home and Adkins arranged with Riddle to go to the George place in Comanche County and make further search for the horse. Riddle proceeded on his journey and was informed that the defendant had been seen with a horse answering the description of that which Adkins gave to Riddle. At the home of Bob George, a brother of the defendant and 130 miles from the place where the horse was taken, the horse was found two weeks after the theft. Riddle took the horse and returned him to Adkins, at the place from which the horse had been taken. The horse had a black mane and had been roached. Other testimony in the case showed that the defendant was seen riding the horse away from the locality where the horse was taken and in the direction of Pott and Comanche Counties. No testimony was offered by the defendant. The defendant was convicted and sentenced to the

penitentiary and he appealed, assigning as error that the evidence was insufficient to establish the *corpus delicti* and insufficient to warrant a conviction, but the Supreme Court of Oklahoma affirmed the conviction upon the foregoing state of facts.

Had a jury trial been demanded in this case, the court is of the opinion that the evidence as disclosed by this record would have required the submission of the case to the jury for the determination of the guilt or innocence of the defendant. No jury trial having been demanded, it is the duty of the court to find the facts. The court is of the opinion that the evidence establishes beyond a reasonable doubt the ownership of the property, the fact that it was stolen, taken, and carried away by the defendant with the intent to deprive the owner of his property, and that the property is of a value in excess of \$50. The court therefore finds the defendant guilty of the crime charged in the information and fixes the value of the property at \$75.

VOLOSHIN, *et al.*, versus RIDENOUR, MARSHAL.

(District Court, Canal Zone, Balboa Division, January 21, 1925.)

Civil No. 685.

1. EXTRADITION. *HABEAS CORPUS*.

Where in an extradition proceeding a decree was entered on October 29, 1923, ordering the extradition of the petitioners to the Republic of Chile, and where such extradition was suspended pending application to the Circuit Court of Appeals and the Circuit Court of Appeals affirmed the judgment of this court and the petitioners gave notice of appeal to the United States Supreme Court, and pending such appeal, action on the extradition of the petitioners was suspended, and where the period for appeal to the Supreme Court expired August 8, 1924, without such appeal being perfected, and where on August 18, 1924, the District Attorney advised the State Department that the time for appeal had expired and advised that the Chilean Government be requested to remove the petitioners, and it appeared that within 4 or 5 days thereafter such information was communicated to the Chilean Ambassador at Washington, D. C., by the Secretary of State and the Secretary of State then transmitted to the Chilean Embassy a warrant for the removal of the petitioners from the Canal Zone to Chile, and where in October, 1924, the Secretary of State again called the Chilean Ambassador's attention to the matter and requested action, and where on January 5, 1925, the attorney for the petitioners notified the Secretary of State that the petitioners would make application for a writ of *habeas corpus* to this court on January 21, 1925, and where it appeared that during the last 4 months of 1924 more than 60 ships carrying passengers left the Canal Zone for Chile, and on or about January 21, 1924, the petitioners made application to this court for a writ of *habeas corpus* alleging that they were unlawfully detained, it is held, that the delay of the

Chilian Government to act in the premises by the removal of the petitioners was unduly prolonged, and that the detention of the petitioners is now illegal and that they are entitled to be discharged.

Attorney for petitioners, *L. S. Carrington*.

For defendant, *J. J. McGuigan*, Assistant District Attorney.

BLACKBURN, Special Judge. In the language of the Circuit Court of Appeals at New Orleans, in passing on the last of these *habeas corpus* cases, I find substantially this language: "The detention of the petitioners is solely by virtue of a warrant issued in pursuance of the order of the District Court made on October 29, 1923." The petitioners presented an appeal to the United States Circuit Court of Appeals of the Fifth Circuit, and requested the Secretary of State of the United States to suspend the execution of the warrant for extradition which had been issued on November 21, 1923, and suspension of execution of said warrant was ordered. On May 8, 1924, the said Circuit Court of Appeals affirmed the judgment of the District Court. The petitioners gave notice of appeal to the United States Supreme Court, and on May 20, 1924, the petitioners again requested, through their attorney, the Secretary of State, to suspend executive action pending the decision of the Supreme Court of the United States, and the Secretary of State again advised petitioners on June 2, 1924, that, in the event the appeal to the Supreme Court is duly perfected, the Department will defer action upon the application for the surrender of the fugitives pending the decision of the Supreme Court. On the 8th of August, 1924, the period of 3 months in which petitioners could appeal to the Supreme Court expired. On the 18th of August, 1924, the United States District Attorney in and for the Canal Zone caused to be sent to the Secretary of State of the United States at Washington, the following radiogram:

Voloshin and Bolshago held for extradition to Chile. Time for appeal to the Supreme Court has expired and no appeal has been taken. Suggest you advise Chilean Ambassador and ask him to have the Chilean Government send official here to remove these parties at once. Papers going forward by mail. (Signed) G. H. Martin, District Attorney.

This radiogram was received by the Secretary of State of the United States on or about August 19, 1924, and 3 or 4 days thereafter the contents thereof were communicated by the Secretary of State of the United States to the Ambassador of Chile at Washington, D. C. On August 18, 1924, the said District Attorney caused to be communicated to the Secretary of State of the United States at Washington, through the Chief of Office of The Panama Canal, a letter as follows:

I am enclosing you herewith two copies of the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Voloshin and Bolshago against Ridenour, marshal, showing that the decision was made and filed May 8, 1924.

These parties had 3 months from that time in which to appeal to the United States Supreme Court. No appeal has been taken and no notice of appeal has been served upon the District Attorney or his assistant here, and the attorney for Voloshin and Bolshago advises me that no steps have been taken to perfect an appeal. The judgment of the Circuit Court of Appeals for the Fifth Circuit, therefore, is final and an executive warrant for the extradition of these parties should issue. Please advise the Secretary of State concerning this matter, and oblige. Yours very truly, (Signed) G. H. Martin, District Attorney.

On or about the 29th of August, 1924, the Secretary of State of the United States at Washington communicated the contents thereof to the Ambassador of Chile at Washington, D. C. On or about October 22, 1924, the Secretary of State of the United States communicated to the Panama Canal authorities, including the District Attorney, the following:

Sir: The Department has received your letter of September 24, 1924, in which, referring to previous correspondence relative to the issuance of an executive warrant for the extradition from the Canal Zone to Chile of Gabriel Constantine Voloshin and Eugenia C. Bolshago, you ask to be advised as to the action taken by this Department in the matter.

A warrant for the surrender of these fugitives was sent to the Chilean Embassy soon after the receipt of the record of proceedings had before the committing magistrate and the information contained in your letters of August 19 and 29, 1924, relative to the expiration of the time for appeal to the Supreme Court and the advisability of removing the fugitives from the Canal Zone to Chile, was duly conveyed to the Chilean Embassy with the request that this Department be advised of the action taken by the Embassy in the premises.

No reply has been received from the Embassy and the Department is therefore recalling the matter to the Embassy's attention.

I am, sir,

Your obedient servant,

For the Secretary of State,

JOSEPH C. GREW,

Under Secretary.

Official copy to Governor and to the District Attorney in duplicate, in connection with the latter's letter to this office, dated August 18, 1924, regarding the extradition of these parties.

On December 8, 1924, the Assistant District Attorney for the Canal Zone sent to the Hon. Carlos Edwards, Consul for Chile, a letter reading as follows:

On May 16, 1924, I sent you, for your files, a copy of the opinion of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La., confirming Judge Wallingford's decision in the extradition cases of Voloshin and Bolshago against Ridenour, United States Marshal for the Canal Zone.

The time in which these defendants could appeal to the United States Supreme Court expired on August 8, 1924, without any appeal having been taken. It is now 4 months since these defendants have been held awaiting action on the part of the Chilean Government for their removal to Chile, but no action has been taken by your Government, so far as this office has been advised, to effect their removal.

Will you kindly advise me, at your earliest opportunity, of the intentions of your Government looking to the prompt removal of these defendants? Very truly yours, J. J. McGuigan, Assistant District Attorney.

It is provided by section 5273 of the Revised Statutes of the United States that, whenever a person who is committed for extradition and is being held until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within 2 calendar months after such commitment over and above the time actually required to convey the prisoner from the jail in which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, upon application made to him by or on behalf of the prisoner so committed and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the prisoner so committed to be discharged out of custody unless sufficient cause be shown to such judge that such discharge ought not to be made. On January 5, 1925, the attorney for these petitioners deposited in the Post Office at Ancon, Canal Zone, a letter addressed to the Secretary of State for the United States at Washington, notifying him of the intention of said attorney to make application to this court on the 21st of January, 1925, for the discharge of these prisoners. I think the notice reasonable in the circumstances of this case.

I now want to consider the question, possibly the larger question, whether sufficient cause has been shown why the discharge of the prisoners ought not to be ordered. The Secretary of State for the United States notified the Chilean Ambassador in Washington of the contents of the letter and radiogram sent by the District Attorney above referred to, and again in October, 1924, the Secretary of State for the United States writes, and referring to the last-mentioned letter, says:

No reply has been received from the Embassy, and the Department is therefore recalling the matter to the Embassy's attention.

Reasonable diligence has not been shown, either by the Chilean Embassy in Washington, D. C., nor by the home office of the Republic of Chile, in attempting to remove these fugitives from the United States, as required by the statute above referred to.

The record showed that during the last 4 months of 1924, more than 60 ships carrying passengers left the Canal Zone for Chile. If the Chilean authorities in Washington, or at the home office, have made any effort during that period to comply with the law governing this matter, there is not a piece of evidence in this case to show it. It has been suggested in argument that negligence or want of due diligence is not lightly to be imputed to Chile; that these prisoners are charged with murder. The rights of the Republic of Chile merit the gravest consideration in the premises, and those rights have had the fullest measure of consideration on my part. On the other hand, these

prisoners have a right to expect, nay, to demand, that their rights too shall be measured by "the golden metewand of the law."

On the evidence submitted in this case, I feel impelled to order that the petitioners, Gabriel Constantine Voloshin and Eugenia C. Bolshago, be discharged out of custody, and it is so ordered.

GOVERNMENT *versus* WEBB.

(District Court, Canal Zone, Balboa Division, January 21, 1925.)

Criminal No. 2114.

1. CRIMINAL LAW. ASSAULT BY MEANS AND FORCE LIKELY TO PRODUCE GREAT BODILY INJURY. INTENT.

On the morning of December 19, 1924, before 6 a. m., the defendant was driving a car on the Gaillard Highway in the direction of Corozal. Allen and three others were walking along said highway in the direction of Corozal. Allen was on the west side of the road near the edge thereof; the other three persons were on the east side of the road. The defendant was driving his car on the left-hand or lawful side of the road, at a speed of from 20 to 25 miles an hour, which was a lawful speed. The vehicle and traffic regulations of the Canal Zone make it unlawful to drive a car on the roads and streets of the Zone before 6 o'clock a. m. without lights; the defendant's car at the time in question was being driven without lights and it was too dark for the defendant to see pedestrians on the road without the aid of lights. Defendant's car struck Allen and inflicted serious injury. Defendant knew that a great many pedestrians travel upon said road between 5 and 6 o'clock in the morning. Held:

1. That in order to sustain a conviction under section 183 of the Penal Code (L. C. Z., 121), it is not necessary for the Government to show a specific criminal intent to injure a particular person.
2. While a criminal intent is generally an element of crime, a presumption of criminal intent may arise from proof of the commission of an unlawful act.
3. In such a case as this it is not necessary that the defendant intended a particular wrong which resulted from his act if he intentionally did an unlawful and wrongful act and in doing so he inflicted an unforeseen injury.
4. That driving an automobile in violation of the law, or driving it recklessly and negligently, without due regard to the rights of others, even though the law is not violated, where injury to another results, supplies the criminal intent necessary to sustain a conviction.

For the Government, *J. J. McGuigan*, Assistant District Attorney.
Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. The defendant is charged in this case with an assault upon the person of one Samuel Allen by means and force likely to produce great bodily injury, under section 183 of the Penal Code of the Canal Zone (L. C. Z., p. 121).

The evidence discloses the following material facts: On the morning of December 19, 1924, Allen and three others were on their way from Panama to Corozal. All were walking. Allen was on the west side

of the road near the edge thereof; the other three persons were on the east side of the road near the edge thereof. The defendant, driving an automobile, was going in the same, to wit, a northerly direction, on the left-hand side of the road, which was the lawful side of the road for travel going in that direction. The testimony undisputedly shows that the automobile was being driven at a speed of from 20 to 25 miles an hour. This was not a violation in terms of the vehicle and traffic regulations of the Canal Zone then in force as to speed. While passing Allen and the other three men in question, the defendant's automobile struck Allen and caused a compound fracture of the right leg between the knee and the ankle. This occurred a few minutes before 6 o'clock in the morning. There was some conflict in the evidence as to whether it was dark or beginning to get light, but I find that it was too dark at the time for the defendant to see pedestrians on the road without the aid of headlights on his car in time to avoid them. The evidence is in conflict as to whether the defendant's car had its lights on, the defendant testifying that they were on and that when he was using his dimmers the light would be thrown on the road at a distance of about 50 feet ahead of the car; on the other hand, the three persons walking along the road on the opposite side thereof from Allen say that there were no lights on the car, and the man riding with the defendant testifies that the defendant had been turning on and turning off the lights but is unable to say whether the lights were on at the time Allen was injured or not. It was unlawful before 6 o'clock a. m., under the vehicle and traffic regulations of the Canal Zone, to drive a car on the roads thereof without lights, and by such vehicle and traffic regulations such act is a criminal act. The defendant and the witness, Atwell, who was riding in his car, testified that they did not see Allen or the other three men but each one noticed the car swerve and felt a jerk or jar. The car was not stopped but the defendant and Atwell continued on their journey. The other three persons with Allen testified that Lecky yelled in a loud voice when they saw the car hit Allen; but the defendant and Atwell say that they heard no one shouting or calling. The defendant testified to driving a car as a chauffeur since 1919, and that he has frequently driven over this particular road during the morning hours between 5 and 6 o'clock, and knew at the time that during that hour a great many pedestrians travel upon said road. The record is silent as to whether the defendant knew Allen and as to the relations, if any, between the two men. The car was a Ford touring car. The defendant testified that its wheels had the habit of becoming locked, and that he thought that was what happened when he felt the jar or jerking movement of the car at the time when the car struck Allen.

Upon this record, the defendant insists in argument that the evidence is insufficient to show any criminal intent which will warrant a conviction, and that the injury to Allen was the result of pure accident and misfortune. The Government contends that the defendant was violating the vehicle and traffic regulations of the Canal Zone at the time; knew that pedestrians used the road at that time; that he was driving without lights; that he was driving at a rate of speed too great for the safety of travelers upon the road at that particular time and under the existing circumstances; and that he was guilty of gross negligence in operating his car at the time when it struck Allen as a result of the facts shown by the record in this case, and that such negligence was the cause of the injury to Allen.

This presents the question, whether the defendant can be legally convicted in the absence of a specific intent to injure Allen; whether the facts and circumstances disclosed in this case supply the criminal intent requisite to a conviction.

Counsel for the defendant have cited the case of *State vs. Richardson* (Iowa), 162 N. W., 28. In that case the indictment charged assault with the intent to do great bodily injury, and the statute defined the crime in the same terms. It is a well-recognized rule, under such statutes that there must be a specific intent. This is true of a great many different statutes of a similar nature, where the doing of an act with a specific intent is prescribed by the statute as the forbidden thing. In all such cases the specific intent must not only be alleged but it must be proven in order to warrant a conviction. The *Richardson* case, however, makes the distinction between the facts necessary to be alleged and proven under the Iowa statute in order to convict and that other class of cases like the instant case where the statute does not require a specific intent in order to sustain a conviction. Our statute provides that "Every person who commits an assault upon the person of another * * * by any means or force likely to produce great bodily injury, is punishable, etc. etc." Under this statute no specific intent need be alleged nor proven. The facts and circumstances must be such, however, as to establish the criminal intent necessary to support a charge of simple assault. 16 C. J., 82-539. *Com. vs. Hawkins*, (Mass.), 32 N. E., 862. *People vs. Harris* (Mich.), 183 N. W., 177 s. c. 16 A. L. R., 910 and notes 914.

Criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he does knowingly. *Reynolds vs. U. S.*, 98 U. S., 145 at 167. A presumption of a criminal intent may arise from proof of the commission of an unlawful act. 16 C. J., 81. While it is a general rule in criminal proceedings that a defendant can not be convicted unless a criminal intent is shown, it is not necessary that he shall have intended

the particular wrong which resulted from his act. If he intends to do an unlawful and wrongful act, and in doing so he inflicts an unforeseen injury, he may be held criminally liable for that injury. 16 C. J., 82. In the Hawkins case, above cited, a revolver was fired in violation of a city ordinance making it a misdemeanor. The bullet struck a person not intended to be hit therewith. In discussing the question, the Supreme Court of Massachusetts uses the following language:

If he (the defendant) intends to do an unlawful and wrongful act which is punishable because it is wrong in itself, and in doing it he inflicts an unforeseen injury, he is criminally liable for that injury * * *. In cases of homicide the rule is well established that one who wantonly, or in a reckless or grossly negligent manner, does that which results in the death of a human being, is guilty of manslaughter, although he did not contemplate such a result. His gross negligence in exposing another to a personal injury by intentionally doing the act makes his intention criminal and supplies all the intent which the law requires to make him responsible for the consequences. This principle is equally applicable to other cases where a personal injury results from a wanton or reckless act which is likely to do bodily harm or from any gross negligence which causes the danger. In the case at bar, if Mary A. Powers had died from the pistol shot, the defendant, on the facts found by the jury, would have been guilty of manslaughter. As she survived the injury, the same principle now requires a conviction of assault and battery. There has been much discussion in the cases in regard to the nature of the intent necessary to constitute this crime, but the better opinion is that nothing more is required than an intentional doing of an action which, by reason of its wanton or grossly negligent character, exposes another to personal injury and causes such an injury.

In some of the earlier cases, like *Com. vs. Adams* (Mass.), 19 Am. Rep., 362, it is held that the wrongful act must be *malum in se* and not *malum prohibitum*, and that one who injures another unintentionally is not guilty of the crime of assault and battery merely because, at the time, he was doing an act which was prohibited by law; but the modern authorities announce a different doctrine and hold that it is sufficient if it is shown that the act which results in the injury is prohibited by statute, regardless of whether it is *malum prohibitum* or *malum in se*. Indeed, an examination of the cases where injuries have been caused by the driving of automobiles in violation of ordinance or statute, shows that in most of the States of the United States which have passed upon this question, the rule has been adopted that driving the automobile in violation of the law, or driving it recklessly and negligently and without due regard to the rights of others, even though the law is not violated, supplies the criminal intent necessary to sustain conviction for injury or death resulting to another struck by the automobile. *People vs. Harris, supra*, and cases cited in note beginning at page 914.

Applying these tests to the facts in the case at bar, the Court is of the opinion that the evidence clearly establishes that the defendant in this case was driving his car without lights, in violation of the vehicle and traffic regulations of the Canal Zone; that at the time it was too

dark for the defendant to see objects such as a pedestrian on the road ahead of his car in time to avoid striking the pedestrian while driving at a speed of 20 to 25 miles an hour; and that the defendant was operating his car under the circumstances in a negligent manner and without due regard to the safety of others upon the highway at the time and place in question. And the Court is of the opinion that such facts and circumstances supply the criminal intent necessary to a conviction in this case.

The Court, therefore, finds the defendant guilty as charged in the information.

SERAPHIN *versus* SHROPSHIRE.

(District Court, Canal Zone, Cristobal Division, February 10, 1925.)

Civil No. 455.

1. PRINCIPAL AND AGENT. LIABILITY OF AGENT.

Plaintiff was employed by the medical department of the United States Army at France Field, Canal Zone, by the defendant, foreman of that department. After working for some months, he was discharged by defendant. He requested the defendant to give him a discharge slip which defendant did not do for some time thereafter. Held, that it appears from the allegations of the plaintiff's complaint treated as true on demurrer, that defendant acted in a representative capacity and within the scope of his authority, and that he is not therefore liable either on account of the discharge of the plaintiff or the failure to give a discharge slip to the plaintiff at the time of discharge.

Attorney for plaintiff, *Ernest Best*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. The plaintiff alleges in his complaint in substance that, on or about January 31, 1921, he was employed by the sanitary division of the medical department of the United States Army at France Field, Canal Zone, at a salary of \$75 per month through the defendant, J. B. Shropshire; that he entered said employment on the first day of February, 1921, and continued in such employment until the seventh day of July, 1923, when "without due and proper cause therefore" plaintiff was laid off from the aforesaid work at France Field, by the said defendant and thereafter and on the eleventh day of said month of July, 1923, plaintiff was discharged from aforesaid employment by said defendant herein on the ground that his "usefulness is over;" that the plaintiff requested the said defendant to give him a discharge slip with a view of the plaintiff securing future employment but that the defendant refused, and continued to so re-

fuse to grant such discharge slip, until on or about June 28, 1924, when a discharge slip of the tenor and effect set forth in the plaintiff's complaint was given by the defendant to the plaintiff, that in consequence of the plaintiff's inability to present a discharge slip, plaintiff was and has been unable to secure employment and was thereby deprived of the means of supporting himself by his employment, all to his damage in the sum of \$1,125, up to and including July 10, 1924, and \$75 per month since said date; and judgment is demanded in the complaint for \$1,125 and for such further sum at the rate of \$75 per month as may be found due, and for costs. To this complaint the defendant has demurred on the grounds: (First) That the complaint does not state facts sufficient to constitute a cause of action, and (Second) That the damages claimed by plaintiff are too remote and speculative.

1. The plaintiff's complaint fails to state a cause of action against the defendant. It is alleged in the complaint (paragraph 3) that he was employed, not by the defendant, but by the sanitary division of the medical department of the United States Army at France Field, Canal Zone. If it may be said that the defendant had anything to do with this contract, it must follow from the allegations from the complaint that he was acting as agent for the sanitary division of the medical department of the United States Army at France Field and not in his individual capacity. Under this contract of employment the plaintiff began his work on February 1, 1921, and continued therein until the seventh day of July, 1923, a period of over 2 years, and presumably was paid his salary by the sanitary division of the medical department of the United States Army at France Field and not by the defendant. It must also be assumed from the allegations of the plaintiff's complaint (paragraph 6) that when the plaintiff was laid off from such work and discharged therefrom that such acts were the acts, not of the defendant, acting in an individual capacity, but those of the sanitary division of the medical department of the United States Army at France Field. Upon the facts alleged in the plaintiff's complaint and the facts legitimately implied therefrom, it must follow that the defendant, in his individual capacity, is not liable to the plaintiff for or on account of his discharge from such employment.

2. The plaintiff alleges further in his complaint, and this seems to be the chief cause of complaint, that he requested of the defendant a discharge slip at the time of his discharge with a view of securing future employment but that the defendant refused and continued to refuse to issue to him such discharge slip until June 28, 1924, when a discharge slip was issued by the defendant to him. This discharge slip states that the plaintiff "worked as foreman of the sanitary gang, medical department of the Army at France Field from February,

1921, to July 7, 1923," and is signed by the defendant as "Sanitary Inspector." There is no allegation in the complaint that it was the duty of the defendant to issue to the plaintiff upon his discharge, or at any other time, a discharge slip. The attention of the court has not been called to any law imposing the duty to issue such a discharge slip to the plaintiff upon his discharge; nor does the complaint allege that there is any rule or regulation of the sanitary division aforesaid requiring the issuance to the plaintiff of such a discharge slip; neither does the contract of employment, as alleged in the plaintiff's complaint, require the issuance to the plaintiff of such a discharge slip. In the absence of any law imposing such duty, and in the absence of allegations in the plaintiff's complaint imposing upon the defendant the contractual duty to give to the plaintiff upon discharge a discharge slip, or in the absence of allegation in the complaint that there is a rule or regulation of such sanitary division imposing such duty, the court must rule and it does rule that the defendant, individually or as sanitary inspector, was not required to give the plaintiff a discharge slip upon his discharge. If the contract of employment provided for the issuance of such discharge slip, that fact should have been pleaded. If there is a rule or regulation of the said sanitary division requiring the issuance of such a discharge slip to the plaintiff, that rule or regulation should have been pleaded; for the court can not take judicial notice of such rule or regulation, if one exists. The allegations of the plaintiff's complaint with respect to this matter are insufficient to support a claim for damages for the failure or refusal of the defendant to give such discharge slip at the time of the plaintiff's discharge.

3. Generally it is a well-recognized rule of law that, where a person acts in a representative capacity to the knowledge of both parties to the transaction, the person acting in such representative capacity can not be made individually responsible for acts performed or contracts made by him in such capacity, if such acts or contracts are within the scope of his authority. It appears from the allegations of this complaint that the plaintiff's contract of employment was made with the sanitary division of the medical department of the United States Army at France Field, and that his discharge was from that employment, and it is fairly inferable from the allegations of the complaint that the defendant, in the entire transaction, in so far as he acted, was acting as the agent and representative of such sanitary division and within the scope of his authority. Under the allegations of the plaintiff's complaint, therefore, the right of action of the plaintiff, if any, can not be asserted against the defendant individually.

The defendant's demurrer is sustained, with leave granted to the plaintiff, if he so elects, to file an amended complaint on or before February 21, 1925.

DIAZ, *et al.*, versus PATTERSON.

(District Court, Canal Zone, Balboa Division, February 27, 1925.)

Civil No. 199.

1. COSTS. PRINTING OF BRIEFS.

On motion to tax costs, it appears that this case was appealed first to the Circuit Court of Appeals, where the defendant paid for printing of briefs \$87.20 and the case was then appealed to the Supreme Court of the United States where the defendant paid \$79.25 for printing briefs, and it appeared that in neither court was the cost of printing briefs taxed as costs but that other costs were taxed, Held,

1. Costs can be imposed and recovered only in cases where there is statutory authority therefor, and allowance of costs is not determined by the form or nature of the action but depends upon the fact as to whether there is a statute or rule of court providing for taxation.
2. Statutes and rules relating to taxation of costs are strictly construed. There being no rule of court either in the Circuit Court of Appeals or in the Supreme Court of the United States providing for the taxation of the costs of printing briefs as costs, and there being no rule or statute in the Canal Zone providing for such taxation the taxation thereof will be denied.

Attorneys for plaintiffs, *Harmodio Arias* and *C. P. Fairman*.

Attorneys for defendant, *Todd* and *McIntyre*.

MARTIN, District Judge. A brief history of this litigation will be found in the opinion of Judge Wallingford, rendered March 15, 1924. In that opinion, this court disposed of the money in the registry of the court which had been deposited therein pending the determination of the litigation, and taxed certain items of cost, Among other items of cost claimed by the defendant in said action were:

Printing briefs in the Circuit Court of Appeals.....	\$87.20
Printing briefs in the United States Supreme Court.....	79.25

With respect to these two items, District Judge Wallingford made the following provision in the opinion above referred to, to wit:

These two items are properly included as valid items of costs but at present there is no showing on file indicating that the items were taxed as costs in the respective upper courts or that the same had never been paid by the plaintiffs. The two said items, aggregating \$166.45, are allowed provisionally as costs to be taxed but the clerk is requested to retain said two amounts out of the proceeds of the cash bond on file until the defendant makes a documentary showing that the said items had in fact been advanced by him and are unsatisfied of record in the two upper courts, respectively.

Pursuant to the foregoing portion of the opinion above referred to, the clerk has retained out of the cash bond deposited by the plaintiffs the sum of \$166.45, and the same is still in the registry of this court.

December 31, 1924, the plaintiffs filed a motion, asking that the court order the payment to them of said sum upon the ground that more than 9 months had elapsed since the said order was entered and

the defendant has failed to make proof that he is entitled to said costs.

It appears that the appeal in this action was decided in favor of the plaintiffs by the Circuit Court of Appeals of the Fifth Circuit, February 9, 1920, and the mandate from said court was filed in this court April 9, 1920, together with an itemized statement of the costs taxed in said Circuit Court of Appeals. Said itemized statement shows that there was no item taxed in said court for the printing of briefs of the defendant.

Thereupon, in due course, said action was appealed to the Supreme Court of the United States, and on December 10, 1923, that court affirmed the decree of said Circuit Court of Appeals, and mandate from said Supreme Court was filed herein February 13, 1924. From the letter of Wm. R. Stansbury, Clerk of said Supreme Court, dated July 3, 1924, addressed to Dr. Gmo. Patterson, and filed by the defendant in this action as a part of the record of this case, it appears that the costs taxed in the United States Supreme Court were:

Clerk's costs.....	\$61.30
Cost of printing parts of record.....	70.50
Attorney's docket fee.....	20.00
<hr/>	
Total	\$151.80

No item is taxed for printing the brief of the plaintiffs in said court. The clerk of said court states in said letter:

* * * that cost of printing briefs for either party is not taxable as part of the costs in this court.

There is no question under the showing made by the defendant in this action but that he paid the cost of printing his briefs in the Circuit Court of Appeals and in the United States Supreme Court in the sums claimed by him, and that such sums have not been repaid.

Upon this state of the record, the question for determination is, whether the cost of printing the defendant's briefs in the Circuit Court of Appeals and the United States Supreme Court, in the aggregate sum of \$166.45, should be finally paid by this court out of the funds in the registry of this court, retained provisionally for such purpose by the order of this court of March 15, 1924, herein quoted. In resolving this question the court deems it advisable to notice briefly, the general law with respect to costs and the statute law and rules of court of the Circuit Court of Appeals and the United States Supreme Court with respect thereto.

At common law, costs were not recoverable, *e. o. nomine*. 15 C. J., 21. *Scatcherd vs. Love*, 166 Fed., 53, 91 C. C. A., 639.

Costs can be imposed and recovered only in cases where there is statutory authority therefore. 15 C. J., 21. *Bowen vs. Construction Co.* 235 Fed., 901. *Tulsa Elec. Co. vs. Scott*, 101 Fed., 524.

The question of allowance of costs is not determined by the form or nature of the action but depends upon the fact whether the case comes within the terms of the statute or rules of court relating to costs. 15 C. J., 21, *Sierra Union Water Co. vs. Wolff* (Cal.) 77 Pac., 1038.

The statutes and rules relating to the taxation of costs are strictly construed. 15 C. J., 24.

Where statutes or rules relating to costs limit the amount of costs recoverable, or contain a fee bill enumerating the specific items which may be taxed, no amount greater than that so limited, nor items other than those so enumerated, can be recovered; and whether the action be at law or in equity, the costs taxed can not exceed that prescribed by statute or rule, and the court must confine its discretion in the taxation of costs to those allowed by statute or rule. 15 C. J., 108-109.

In this case it appears that the plaintiffs made a deposit of \$4,000 as a cash bond for the purpose of securing payment of costs. Such bond of course carries with it liability for all costs to which the opposite party may become entitled under statutes or rules relating thereto. Such bonds are restricted to such costs as are properly taxable and have been awarded and actually taxed. 4 C. J., 1294. *Kellogg vs. Howes* (Cal.) 29 Pac., 230.

In the California case cited, the plaintiff brought an action against the defendant and his sureties upon a *supersedeas* bond given for an appeal to the Supreme Court of the United States. The Supreme Court of the United States affirmed the decision of the Supreme Court of the State of California and awarded costs, a memorandum whereof was attached to the mandate. The defendant in that action, also one of the defendants in the cited case, paid the judgment and the costs in the Supreme Court of the United States, as shown by the memorandum attached to the mandate. Thereupon this action was brought to recover \$700.30 for certain items of costs in the Supreme Court of the United States, including the following item: "Printing briefs on motion to dismiss, \$59." In deciding the case against the plaintiffs, the Supreme Court of California uses the following language:

We think the condition named in the bond should be given the same construction by this court that is placed upon it by the Supreme Court of the United States, the court that framed it. The parties who executed the bond presumably entered into the undertaking with a knowledge of the construction which had been placed upon it by the national courts and in the belief that their obligation would be measured by such consideration. The cost of the clerk's certificate, printing briefs, sending transcript to Washington, and telegraphing the appearance of attorneys, if proper items of costs to be allowed at all, should have been taxed up as such. The term "costs" has the well-known meaning, and whatever costs are claimed and recovered must be taxed in the action in which they are allowed.

Considering now the question of the statutes and rules of court relating to the taxation of the two items of costs involved in this con-

troversy, counsel has not cited the court to any provision of the statutes of the United States, nor has the court been able to find any such provision, authorizing the taxation as costs, either in the Circuit Court of Appeals or in the Supreme Court of the United States, of the expenditure for printing briefs. The rules of the Circuit Court of Appeals relating to briefs (rules 24 and 26), contain no provision for the taxation of the cost of the printing thereof. Rule 23 provides how the record in the case shall be printed, and subdivision 6 thereof provides for the taxation as costs of the clerk's fee for supervising the printing of the record and the cost of printing the same. Rule 31 provides for the taxation of costs to the losing party in the case; provides that the cost of a transcript of the record from the court below shall be taxable in that court as costs in the case; and provides that, "when costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other process, sent to the court below and annex to the same the bill of articles taxed in detail."

Rule 21 of the Supreme Court of the United States, relating to the filing and contents of briefs, contains no provision for the taxation as costs of the expense of printing the same. Rules 10 and 24 provide for the supervision and printing of the records and the taxation of costs. These provide, in substance, that the cost of the transcript of the record from the court below and the costs of printing the record in the Supreme Court and of the clerk in supervising such printing and other items, shall be taxable as costs, but there is not found therein any provision for taxing as costs the expense of printing briefs. Subdivision 6 of rule 24 contains the following provision, identical with subdivision 5, rule 31 of the Fifth Circuit Court of Appeals:

When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below and annex to the same the bill of articles taxed in detail.

It thus appears that there is neither statutory nor rule authority, either in the Circuit Court of Appeals for the Fifth Circuit or in the Supreme Court of the United States, for taxing as costs the expense of printing briefs. The fact that authority is given by statute and by rule for taxing the costs of the transcript from the court below, and the supervising and printing of the record in the appellate court, and that no provision is found for taxing the cost of printing briefs, and the fact that costs may not be taxed except where authorized by statute or rule of court, make it necessary for this court to hold that the cost of printing briefs in the Circuit Court of Appeals and the United States Supreme Court can not lawfully be taxed as costs in this case. The fact that the Fifth Circuit Court of Appeals did not tax the cost of printing the brief in that court, and that the Supreme Court did not

tax the cost of printing the brief in that court, coupled with the fact that there is no statute or rule authorizing the taxation of such costs, requires the court to hold that such costs are not taxable.

In addition to the foregoing, this court is of the opinion and so decides that, in the absence of a mandate from the appellate courts, or either of them, requiring the taxation of such items as costs, it has no power to tax herein costs incurred in such appellate courts, or either of them.

The foregoing opinion with respect to rules of court relating to taxation of costs must not be construed as deciding or holding that a court may make a rule for the taxation of costs without statutory authority, or in contravention of statutory provisions.

There seems to be an apparent conflict between that portion of the opinion of Judge Wallington, hereinbefore quoted, and this opinion with respect to the taxation of these two items of costs. The conflict, however, is only apparent and not real. While Judge Wallingford therein said that "these two items are properly included as valid items of costs," he also said that, "there is no showing on file indicating that the items were taxed as costs in the respective upper courts," and he then provided therein that the \$166.45 should be retained out of the proceeds of the cash bond "until the defendant does make a documentary showing that the said items had in fact been advanced by him and are unsatisfied of record in the two upper courts, respectively." The language used denotes that Judge Wallington would not have held that the two items are properly included as valid items of costs if it had then appeared that these items had not been taxed as costs in the appellate courts, and this is made to clearly appear by his requirement that there be a documentary showing that such items are unsatisfied of record in the appellate courts.

The motion of the plaintiffs is therefore sustained, and an order will be entered directing the clerk of this court to pay to the plaintiffs, or to their attorney of record, the said sum of \$166.45 now in the registry of this court.

MORGAN *versus* MORGAN.

(District Court, Canal Zone, Balboa Division, March 10, 1925.)

Civil No. 686.

1. DIVORCE. EXTREME AND REPEATED CRUELTY.

What constitutes "extreme and repeated cruelty" stated in the divorce act as a ground for divorce can not be definitely defined so as to establish a rule of general application to all cases. It is a relative term, and each case must be determined on its own facts.

2. DIVORCE. HABITUAL DRUNKENNESS.

Where the evidence fails to show habitual drunkenness for a period of 2 years so that the same may be considered a ground for divorce, yet intoxication

of the defendant as shown by the evidence in the case may properly be considered, with other facts and circumstances, as tending to show "extreme and repeated cruelty."

3. DIVORCE. EXTREME AND REPEATED CRUELTY.

Acts of physical violence are not necessary to establish extreme and repeated cruelty under our divorce code. It may be established by showing a course of conduct such as destroys the peace of mind and happiness and injures the health or reason of the injured party and thereby defeats the legitimate objects of marriage.

Attorney for plaintiff, *E. M. Robinson*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. This action was brought by the plaintiff against the defendant, her husband, to procure an absolute divorce, the custody of a minor child, and alimony, upon the grounds of (1) habitual drunkenness; and (2) extreme and repeated cruelty.

The defendant by his answer denies the habitual drunkenness and the extreme and repeated cruelty, and alleges that he has done everything humanly possible to bring about a reconciliation with his wife for the purpose of reestablishing happy marital conditions and enabling the minor child in question to have a happy and proper home, but that such efforts have been unavailing.

On motion made at the conclusion of the evidence, the court held that the evidence was not sufficient to show habitual drunkenness for a period of 2 years preceding the action, as defined by subdivision 6 of section 12 of the Act of Congress, approved September 21, 1922, so that the case is to be decided upon the question whether the plaintiff has made a case of extreme cruelty as defined by subdivision 8 of section 12, *supra*, providing that, where a party

has been guilty of extreme and repeated cruelty, involving acts of grievous bodily injury or producing grievous mental suffering endangering life, health, or reason, a divorce may be granted by the District Court of the Canal Zone.

Extreme and repeated cruelty can not be definitely defined so as to establish a rule of general application to all cases. It is a relative term. Each case must be determined on its own facts.

19 C. J., 44.

Donaldson *vs.* Donaldson (Idaho), 170 Pac., 94.

McDonald *vs.* McDonald (Cal.), 102 Pac., 92.

S. C. 25 L. R. A. N. S., 45.

Barnes *vs.* Barnes (Cal.), 30 Pac., 298.

It appears without dispute in this case that the plaintiff and defendant were married November 4, 1915, at Ancon, in the Canal Zone, and that the plaintiff and defendant ever since have been and now are husband and wife; that the plaintiff and defendant have resided together in the Canal Zone since the time of their marriage, except for a short period of time when they resided in New York, and that such parties have resided in the Canal Zone for more than one year prior to

the commencement of this action, during which time the plaintiff has been an employee of the Panama Railroad, in the Commissary Division thereof at Ancon; that there has been born to the plaintiff and defendant one girl child, Virginia Lucille, 6 years of age, which child is upon the Canal Zone in the custody of the plaintiff.

The court further finds from the evidence in the case that, on the evening of the day when the plaintiff and defendant were married, the defendant left his wife at the Washington Hotel in Colon, Republic of Panama, and spent the entire evening, up to approximately midnight, in having a good time with his friends, and that he returned to the hotel in an intoxicated condition; that during all of the duration of married life of the parties, with the exception of one year, the defendant has been addicted to the excessive use of intoxicating liquors; that he has frequently returned to his home in an intoxicated condition; that on some occasions it has been necessary for his friends to help him into the house, he being so intoxicated that he was unable to reach the house alone without aid; that on one occasion he was found in the back yard by his wife, crawling toward the house on his stomach, so intoxicated that he could neither stand nor walk, and that she assisted him into the house and undressed him and put him to bed; and that upon one occasion he referred to the plaintiff, in talking with a policeman, as "a son-of-a-bitch," which fact was communicated to the plaintiff. On one occasion, when the minor child of the parties was about 3 years old and while the defendant was in an intoxicated condition, it is testified to by the plaintiff, that the defendant choked said child in such manner as to leave the marks of his fingers on her throat, and that when the plaintiff interfered the defendant choked the plaintiff, and while the defendant denies that he choked the child he does not convincingly deny that he choked the plaintiff on this occasion; on another occasion, in the presence of the defendant's mother and a Mrs. Pearson, while intoxicated, the defendant lied to his mother as to his whereabouts during the afternoon, and when the mother asked the plaintiff concerning the matter and the plaintiff replied that she would have to ask her son, the defendant slapped the plaintiff in the face. Many other facts and circumstances testified to in the case lead the court to the inevitable conclusion that the defendant has, during all of the married life of the parties with the exception of one year, frequently and repeatedly become intoxicated; that such intoxication was frequently witnessed by the plaintiff in the presence of other people; that during such periods of intoxication the defendant treated the plaintiff with harshness and cruelty, and upon the two occasions referred to above used physical violence.

It further appears from the evidence that on two or three occasions prior to January 21, 1925, the plaintiff has left the defendant with the

intention of no longer living with him but because of the promises of the defendant to quit drinking and treat her decently, and because of the importunities of mutual friends, she has forgiven him and the marital relations have been reestablished.

It appears from the plaintiff's testimony, and her conduct and demeanor upon the witness stand, and from the testimony of others that the plaintiff is a woman of refinement and of a sensitive nature that she has opposed the use of intoxicating liquors by the defendant on account of his excessive use thereof; that the plaintiff has not contributed to the defendant's conduct in any way and has not provoked any of the difficulties which have arisen between the plaintiff and the defendant; that she has been a loving and dutiful wife and has not failed in any respect in the performance of her marital duties. Indeed, the defendant makes no claim, either by his pleading or proofs in the case, that the plaintiff has failed in any respect to be a good wife to him. He admits much of what she has testified to, and such denials as he has made are not in the least convincing of the truth thereof. While it is true that the plaintiff has been working with practical continuity for the past 3 years, it is nevertheless apparent from the other testimony in the case that the conduct of the defendant has been such as to inflict upon her grievous mental suffering endangering her health and her reason.

While the evidence, as the court has held, is insufficient to show habitual drunkenness for a period of 2 years so as to establish the same as a ground for divorce, yet the intoxication of the defendant, as shown by the evidence in this case, may properly be and is considered in connection with the other facts and circumstances as showing or tending to show extreme cruelty.

Grierson vs. Grierson (Cal.), 105 Pac., 120.

Sedgwick vs. Sedgwick (Colo.), 114 Pac., 488.

To establish extreme cruelty there need not be acts of physical violence; it may be established by showing a course of conduct such as destroys the peace of mind and happiness of the injured party, and such as endangers the health or reason of such injured party, or entirely defeats the legitimate objects of the marriage.

19 C. J., 45.

Roberts vs. Roberts (Kan.), 176 Pac., 387.

Perkins vs. Perkins (Cal.), 154 Pac., 483.

Hilderbrand vs. Hilderbrand (Okl.), 131 Pac., 711.

Donaldson vs. Donaldson, *supra*.

Rosenfeld vs. Rosenfeld (Colo.), 40 Pac., 49.

Carpenter vs. Carpenter (Kan.), 2 Pac., 144.

It is true that under the ancient rule of decision, and in many of the earlier decisions of many of our States, and under the decisions of two or three of the States at the present time, extreme cruelty is not proved

unless there be evidence of physical violence; and many of the decisions of the courts of last resort in the States rendered in an early day, can be found holding to such a rule. Typical of these are *Morris vs. Morris*, 14 Cal., 76, and *Waldron vs. Waldron* (Cal.), 24 Pac., 649, cited by the defendant, but these cases have been overruled and the law as therein established abandoned by the California courts, as evidenced by the case of *Barnes vs. Barnes*, 30 Pac., 298, and *Perkins vs. Perkins* 154 Pac., 483. The case of *Gilbertson vs. Gilbertson* (Ia.), 41 N. W., 573, cited by the defendant, was decided under a statute which defined extreme cruelty as "conduct endangering life." Our statute is broader than the Iowa statute in that it embodies the element of danger to health and danger to reason in addition to danger to life, and so the Iowa case is not in point. This early doctrine makes legal cruelty depend not on the misconduct of the husband but on the endurance of the wife; not on the guilt of the wrongdoer but on the vitality of the victim. The anguish of the mind must have eaten through the flesh and exhibited itself in bodily disease before there can be any legal proof of cruelty under this rule. The modern doctrine, however, supported by an overwhelming weight of authority, and commending itself to this court as the proper doctrine, is, that extreme cruelty may be as effectually caused by conduct which produces mental suffering and robs the plaintiff of peace of mind as by blows inflicted, and that, to many persons the burden of mental suffering will be much harder to bear than the burden of any ordinary physical suffering.

The Court therefore holds that the proof in this case is ample to warrant the Court in granting the plaintiff a divorce on the ground of extreme and repeated cruelty even though there had been no proof of physical violence, but coupled with the proof of physical violence there is shown such a state of facts as should lead any conscientious court unhesitatingly to hold that extreme and repeated cruelty, endangering health and reason, has been established.

Let judgment and decree in favor of the plaintiff for an absolute divorce on the ground of extreme and repeated cruelty be entered, with an award therein of the custody of the minor child under the conditions therein named, and with alimony awarded as specified in said decree.

IN RE ADOPTION OF ADELLA MARKERT, A MINOR.

(District Court, Canal Zone, Balboa Division, March 16, 1925.)

Civil No. 692.

1. MINORS. ADOPTION. DECREE OF ADOPTION. FRAUD.

Where it appears that the petitioners, a husband and wife, presented a proper petition to the court for the adoption of the minor in question, alleging that

the mother of said minor and the father had been divorced; that the mother is dead and the father has abandoned the child; and a proper third person is appointed as the next friend of said minor to act in such proceedings in behalf of the minor, and the court after due proof entered a decree of adoption, it is held that such decree was not obtained by fraud, misrepresentation, or deceit.

2. ADOPTION. MINOR. JURISDICTION.

Where it appears that such decree was entered without any notice of any kind to the father, who was alleged to have abandoned the minor, and the father did not have actual knowledge of the proceeding or make any appearance therein, it is held that the court had no jurisdiction and that the decree of adoption is consequently void.

3. CONSTITUTIONAL LAW. DUE PROCESS OF LAW.

The provision of the Fifth Amendment to the Constitution of the United States that no person shall be deprived of life, liberty, or property without due process of law, which is embodied in the Executive Order of May 9, 1904 (E. O., 23), precludes the court from entering a decree in an adoption proceeding depriving a nonconsenting natural parent of the custody of his child until such parent has been given due notice of the proceedings and an opportunity to defend against the same, even though the chapter of the Code of Civil Procedure relating to the adoption and custody of minors fails to provide for the giving of any notice of an adoption proceeding.

4. DUE PROCESS OF LAW, WHAT IS.

The term "due process of law" means a course of legal proceedings according to the rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected; it must give to them an opportunity to be heard respecting the justice of the judgment sought; it must be one which gives notice of the proceeding to the parties adversely affected, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.

Attorney for petitioner, *E. M. Robinson.*

Attorney for respondent, *L. S. Carrington.*

MARTIN, District Judge. March 4, 1925, Randolph E. Snediker, and Ana E. Snediker, his wife, presented a petition to this Court, praying for the adoption of Adella Markert, a minor, alleging therein that the mother of said minor was divorced from her husband, Arthur Markert, by decree of this Court, January 22, 1925, and by such decree was awarded the custody of said minor child; that the said mother died March 3, 1925, and that Arthur Markert, the father of the child, had abandoned such child and that such child has no legal guardian; and that the child was in the custody of the petitioner. This petition is duly verified. On the same date the Court made an order appointing Mrs. D. H. Moore, a resident of Pedro Miguel, in the Canal Zone, as the next friend of said minor, to act in said proceeding in behalf of the minor; that on the same date the Court entered a decree granting the prayer of said petition and decreeing the adoption of said minor

by the said Snedikers. March 11, 1925, Arthur Markert filed herein a motion to vacate and set aside the decree of adoption on two grounds:

1st. That said decree was obtained by fraud, misrepresentation, and deceit.

2d. That the Court was without jurisdiction to grant said order of adoption because no notice of said proceedings was ever given to said Arthur Markert, nor his consent to the adoption of said minor obtained.

A hearing was ordered on said motion for the 14th day of March, 1925, upon oral testimony, at which time the Snedikers were present in person and by their attorney, E. M. Robinson, and Arthur Markert was present in person and by his attorney, L. S. Carrington. After hearing the evidence and arguments of counsel, the case was taken under advisement by the Court.

The court having considered the case, finds from the evidence that there was no fraud, deceit, or misrepresentation practiced by the Snedikers in the adoption proceedings, and the first ground of the motion is therefore denied and Arthur Markert is given an exception thereto.

The second ground of the motion presents the question whether this court has jurisdiction to grant a decree of adoption without notice of the proceeding and an opportunity to defend against the same to the natural father of the minor. It also presents the subsidiary question, namely, did the decree of divorce which awarded the custody of the minor child absolutely and unconditionally to the mother deprive the said Arthur Markert, defendant in the divorce action, of his rights as the natural father of the minor. The second question above noted will be considered first.

Subdivision D, of section 20, of the amendment to the Panama Canal Act, approved September 21, 1922 (Treaties and Acts, p. 286), provides that when a divorce shall be decreed, the court may make such order touching the care, custody, and support of the children as from the circumstances of the parties and the nature of the case, shall be reasonable and just. And the court may, on application, from time to time make such alterations with reference to the care, custody, and support of the children as shall appear reasonable and proper. The general law seems to be that the court has no jurisdiction to render a final and irrevocable decree concerning the custody of a minor child of divorced parents (19 C. J., 349); and on the death of the parent to whom the custody of the child is awarded the other parent ordinarily succeeds to the right of custody. (19 C. J., 349 and cases there cited.) Our statute, by its express provisions, makes the general law thus stated the statute law of this jurisdiction, and the court may, on application at any time after the decree of divorce is granted and upon a proper showing, modify, change, or abrogate the decree of divorce with respect to the custody of a minor child. Therefore, even though

the decree of divorce in this case gave Adella Markert the absolute and unconditional custody and control of the minor in question, the court still retained the power to modify, change, or abrogate such decree with respect to such matter at any time upon the application of the father, and upon a showing warranting such change. Certainly the father had the right under the statute to make an application in the divorce proceeding for a change of custody of the child at any time after the decree was granted upon a proper application and showing, and that being true, it must be conceded that he had a sufficient personal right to entitle him to notice in the adoption proceedings of the purpose thereof, and to defend against such proceedings, if he so elected.

The first question above suggested will now be considered. The common law did not recognize the status of adoption. The right to adopt is purely a creature of statute. Code of Civil Procedure, section 794, provides that a husband and wife jointly, who are inhabitants of the Canal Zone, may petition the District Court for leave to adopt a minor child:

* * * but written consent must be given for the adoption of such child by each of his or her living parents who is not hopelessly insane or intemperate, or has not abandoned such child, or if there are no such parents, or if the parents are unknown, or have abandoned such child, or if they are hopelessly insane or intemperate, then by the legal guardian, or if there is no such guardian, then by a discreet and suitable person appointed by the court to act in the proceedings as the next friend of such child.

This section is found in chapter 44 of the Code of Civil Procedure, entitled "Adoption and Custody of Minors." There does not appear to be any provision in said chapter for the giving of notice to a parent who is hopelessly insane, or intemperate, or who has abandoned his child. The inquiry naturally suggests itself whether Congress has the power to provide that a minor child may be adopted under the law above cited under the circumstances disclosed in this case without giving to the natural parent or parents of such child notice of the proceeding and an opportunity to be heard therein.

The Fifth Amendment to the Constitution of the United States provides that:

* * * nor (shall any person) be deprived of life, liberty, or property without due process of law.

The courts of the United States have been frequently called upon to define what is meant by the words "due process of law" as used in this amendment, and uniformly the holding is that the term means a course of legal proceedings according to the rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law; it

must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. While it is true that the Constitution of the United States is not applicable to the Canal Zone unless made so by congressional enactment, yet it does appear from the Executive Order of May 9, 1904, (E. O., 23), that the foregoing provision quoted from the Fifth Amendment to the Constitution of the United States, has been embodied in the laws of the Canal Zone and made applicable to the Canal Zone. The language used is:

* * * that no person shall be deprived of life, liberty, or property without due process of law.

This Executive Order has been made a congressional enactment by the provisions of section 2 of the Act of Congress, approved August 24,, 1912, known as the "Panama Canal Act." (Treaties and Acts, 79). *Smith vs. Jackson*, 241 Fed., 747, *affd.* by U. S. Supreme Court, 246 U. S., page 388.

Section 11, subdivision 7, of the Code of Civil Procedure provides, "Every court shall have power to amend and control its processes and orders so as to make them conformable to law and justice."

Considering that the "due process" clause of the Constitution has been applied to the Canal Zone by congressional enactment; that due process in an adoption proceeding, which is a judicial proceeding, contemplates notice to the nonconsenting natural parent or parents of the minor and an opportunity for such parent or parents to be heard in such proceeding; that the court has the power, under subdivision 7 of section 11 of the Code of Civil Procedure to control its processes so as to make such processes conformable to law and justice, it necessarily follows that the decree of adoption entered in this case without notice to Arthur Markert, the natural father of the minor in question, was entered without the necessary steps having been taken to give the court jurisdiction. It is true that there are some decisions, like *Regent vs. Powell* (Wyo.), 33 Pac., 23; 20 L. R. A., 199, that hold to a contrary doctrine, but the overwhelming weight of authority is to the effect that if a parent has any right at all with respect to the custody of a minor child of such parent, such right can not be taken away from such parent by a judgment or decree of court until such parent has been notified in some manner of the proceeding and opportunity given to be heard therein. (See extensive notes to the case of *Lacher vs. Venus* (Wis.), 188 N. W., 613; 24 A. L. R., 416.

Nothing contained in this opinion shall be construed as a finding upon the facts which may hereafter arise in the adoption proceeding.

The decree of adoption of said minor entered by this Court on the fourth day of March, 1925, will be vacated and set aside, and leave will

be granted to the said Arthur Markert, who has voluntarily appeared in this action, to file an answer to the petition for adoption within 10 days from this date, and with leave to the next friend of said minor to file a written consent to the adoption, if she so elects, to the end that a trial may be had upon such petition and the answer thereto.

ROBERTS *versus* BIRON.

(District Court, Canal Zone, Cristobal Division, March 20, 1925.)

Civil No. 450.

1. BAILMENT. IMPLIED CONTRACT.

Where defendant rented the plaintiff's car without any agreement as to the amount to be paid for its use, there arises therefrom an implied contract to pay the reasonable value of such use, thus creating a bailment for the benefit of both parties.

2. BAILMENT. NEGLIGENCE.

Under such contract of bailment, the bailee is bound to use ordinary care to preserve and protect the property while in his possession as bailee and is liable for damages resulting from lack of such degree of care.

3. ROADS AND STREETS. NEGLIGENCE. NEGLIGENCE OF THIRD PARTY. PROXIMATE CAUSE.

Defendant was driving the car in question on the Bolivar Highway at an unlawful speed, but otherwise in a lawful manner. As defendant approached a curve, another car, driven in the opposite direction by an unknown party, passed. The latter car was negligently in the middle of the road and had flare headlights which blinded the defendant. Defendant's car was forced off the road where the left wheels of the car encountered wet clay, the brakes failed to control the car and it ran off the road turning over and resulting in the damage claimed by plaintiff. It appeared that but for the unlawful acts of the driver of the unknown car, the accident would not have happened. Held, that, although the defendant was driving the car in question at a speed 2 miles per hour more than the lawful rate of speed and was thereby negligent, still if the injury complained of was produced only through the intervening, independent act of a third party, the defendant would not be liable.

Attorney for plaintiff, *Simon K. Loy*.

Attorney for defendant, *E. A. Reid*.

MARTIN, District Judge. The plaintiff brings this action as the owner of the car in controversy to recover the sum of \$950.35 for the cost of repairing said car and depreciation in its value due to an accident occurring on the 6th of October, 1924, in the Canal Zone, resulting in injury to the car. The grounds of recovery are:

1st. An alleged contract by which the plaintiff let said car to the defendant for hire at the rate of \$3 per hour, and an alleged agreement on the part of the defendant to deliver the said car back to the plaintiff in the same condition as when he received it, and,

2d. That the accident, resulting in the damage to the car, was due to the carelessness, recklessness, and negligence of the defendant, and the unskillful manner in which he operated said car.

The answer of the defendant denies every material allegation of the plaintiff's complaint.

The evidence quite satisfactorily establishes that about midnight of the 5-6 of October, 1924, the defendant hired the plaintiff's car for 2 hours, and that the defendant and three of his companions thereafter used the car until the time of the accident resulting in damage to the car. The Court finds, however, that the defendant at the time of the hiring of said car did not agree with the plaintiff that he would return said car in the same condition as when he received it. The burden of proof is upon the plaintiff upon such issue, and while the plaintiff testifies to such an agreement, the defendant denies this, and the defendant is positively corroborated by two of his companions who are disinterested witnesses, and the Court finds that the plaintiff has not sustained the burden of proof on this question.

It does appear, however, and the Court so finds, that the plaintiff rented the car to the defendant, thereby creating a bailment for mutual benefit; for even though the price which the defendant was to pay was not agreed upon between them, there would arise on the part of the defendant an implied contract to pay a reasonable value for the use thereof. The Court finds that it was clearly the intention of both parties that the car was let to the defendant for hire.

Where there is a bailment for the benefit of both parties to the contract, the bailee, so long as the property is in his possession, must use ordinary care to protect and preserve the property and is liable to the bailor only for the result of ordinary negligence. (6 C. J., 1121).

There remains then the question whether the defendant, under the circumstances disclosed by the evidence, exercised ordinary care or was guilty of negligence as charged in the plaintiff's complaint. It appears that the defendant and three companions entered the car, the defendant driving the car; that they journeyed to Gatun and while returning from Gatun over the Bolivar Highway and as the car in question was approaching a turn in the road another car going in the opposite direction rounded the turn displaying bright or flare headlights, and that this car was traveling in the center of the road. At the time the other car first came into sight the car in question, driven by the defendant, was about 80 to 100 feet distant therefrom, and the defendant was driving it on the left-hand or lawful side of the road. It appears that the bright headlights of the car approaching the defendant and the car in question blinded the defendant so that he could not see the road ahead, and the approaching car was in the center of the road, and this, together with the bright light from such car,

caused the defendant to run the car in controversy off the road about 3 feet, where the wheels encountered damp, yellow clay. It appears that the defendant was driving the car in question at the time the other car rounded the curve at a distance of 80 to 100 feet, at approximately 27 miles an hour. This was an unlawful rate of speed under the provisions of section 18 of Executive Order of April 14, 1921, adopted pursuant to the Act of Congress approved August 21, 1916. A presumption of negligence on the part of the defendant therefore arises from the fact that he was driving the car at the time in question at an unlawful rate of speed. (Section 18, *supra*.) It further appears from the evidence that the left wheels of the machine driven by the defendant went off the road about 3 feet at the time the car in question passed the approaching car; that the defendant applied the brakes on the car in question and had slowed the car to approximately 23 miles an hour at the time the other car passed but that while the wheels of the car in controversy were on the yellow clay at the side of the road the brakes did not seem to slow up the progress of the car, and it is quite apparent from the evidence that from the time the wheels of the car in controversy left the pavement and struck the damp yellow clay at the side of the road, that the defendant practically lost control of the car in question, and that in a short distance it ran off the grade about 50 feet to one side of the road, turning over once and causing the injury to the car of which the plaintiff complains and for which he seeks to recover damages.

Under such circumstances, the natural inquiry is, was the defendant's negligence in driving the car in question at an unlawful rate of speed the proximate cause of the injury. In other words, would the accident have happened as the natural result of the unlawful rate of speed at which the defendant was driving the car in question if the other car had not appeared on the scene at the time and under the circumstances disclosed by the evidence? Or was the approaching car, with its flare headlights, blinding the defendant, and driving in the center of the road, responsible for what subsequently happened to the car in controversy? By section 17 of the Executive Order of April 14, 1921, *supra*, it is made unlawful for anyone to use flare lights at a distance of less than 300 feet from an approaching car, or with such flare lights to pass another car upon the roads of the Canal Zone. By section 13 of the same Executive Order, vehicles are required to keep to the left of the road; so that under the facts disclosed in this case the driver of the car which approached the one which the defendant was driving was violating two of the provisions of the laws of the Canal Zone. The rule is laid down, that:

* * * where there has intervened between defendant's act and injury, an independent, illegal act of a third person producing the injury, and without which

such injury would not have occurred, the act of the third person is held to be the proximate cause of the loss and the defendant is excused from liability. Or, as the principle has been expressed, although there may have been an original wrongful act, if it produced injury, only through the intervening, independent, and wrongful acts of others, the author of the former is not liable in damages.

17 C. J., 738.

Milwaukee & St. Paul Ry. Co. *vs.* Kellogg, 94 U. S., 469.

Nirdlinger *vs.* American District Telegraph Co. (Pa.), 91 Atlantic, 883.

Carter *vs.* Atlantic Coast Line R. R. Co. (S. C.), 11 A. L. R., 1411.

Hellan *vs.* Supply Laundry Co. (Wash.), 163 Pac., 9.

Pyers *vs.* Tiers (N. J.), 99 Atl., 130.

Huddy on automobiles, pp. 290-291.

If this rule be applied to the facts in this case, concededly the defendant in driving the car in controversy at an unlawful speed is charged only with the natural, ordinary consequences of such unlawful speed and such consequences as might have been foreseen and guarded against. Even though the defendant was driving at an unlawful speed and therefore negligently, he had the right to assume that drivers going in the opposite direction and meeting the car in question would keep to the left of the road and would not undertake to pass him with flare headlights. Had the car approaching and passing the one driven by the defendant kept to its own side of the road and dimmed its lights, as the vehicle and traffic laws of the Canal Zone require, it is as certain as anything can be that no accident would have occurred, the defendant would not have lost control of the car he was driving and the injury to the car would not have resulted. The court therefore finds that the efficient and proximate cause of the injury to the plaintiff's car was the negligence of the driver of the car which approached and passed the plaintiff's car being driven by the defendant, with flare headlights and without keeping to the left-hand side of the road as the law requires; that such approaching car was in no manner under the control of the defendant and was an intervening, independent agency, operated in a wrongful and negligent manner; and that because thereof the defendant is not liable to the plaintiff on account of the resulting injury to the plaintiff's car.

Let judgment be entered, dismissing the plaintiff's complaint, and in favor of the defendant for costs.

MULDOON *versus* MULDOON.

(District Court, Canal Zone, Balboa Division, March 20, 1925.)

Civil No. 671.

1. DIVORCE. JURISDICTION. ISSUANCE AND PUBLICATION OF PROCESS.

It appears in this case on a motion of the defendant to quash service of the summons by publication that the plaintiff filed her complaint September 8, 1924, asking for a divorce on statutory grounds. Summons duly issued on

that date and the marshal returned the same September 11, 1924, showing that the defendant could not be found in the Canal Zone. Thereafter, and on the same date, plaintiff filed her affidavit for service of notice of pendency of the suit by publication; the clerk issued such notice and caused the same to be published and a copy thereof to be mailed, as required by the divorce code. On motion, the Court held the affidavit for service of process by publication to be insufficient, and on December 24, 1924, quashed the service of process and granted leave to the plaintiff to file a new affidavit and proceed to serve process anew by publication. December 29, 1924, the plaintiff filed another affidavit for service of notice of publication but the clerk did not issue any new process nor direct or cause any notice of pendency of suit to be published, but the plaintiff and her attorney caused a notice of pendency of suit to be published in a weekly newspaper published in the Republic of Panama. Motion was made to quash the service because the same was made without and in the absence of any request or order of the clerk of this court, and without his knowledge or authority. It was held:

1. That the issuance and service of process in the manner pointed out in the divorce code alone gives the court jurisdiction to try the case and enter a decree, and that under the provisions of the divorce code the process, viz., notice of pendency of suit, must be signed by the clerk and attested with the seal of the court.
2. That when the court held that the first affidavit filed by the plaintiff was insufficient to warrant the issuance and service of process by publication, and quashed the service thereof, the notice of pendency of suit issued by the clerk upon the insufficient affidavit became *functus officio*, and that before the court could acquire jurisdiction in the present proceedings it was necessary to have a new notice of pendency of suit issued in conformity with the divorce code.
3. That the statutory provision relating to service of notice of pendency of suit by publication must be strictly complied with or the court acquires no jurisdiction to render a decree.

Attorney for plaintiff, *E. M. Robinson*.

Attorney for defendant, *Felix E. Porter*.

MARTIN, District Judge. This action was commenced by plaintiff to procure a divorce from the defendant under the provisions of the Divorce Code (Act of Congress, approved September 21, 1922), by the filing of a petition, September 8, 1924.

Summons issued on that date and the same was returned by the marshal of the Canal Zone, September 11, 1924, showing that defendant could not be found in the Canal Zone.

September 11, 1924, the plaintiff filed her affidavit for service of notice of pendency of the suit, by publication. The clerk duly issued notice of pendency of suit and caused the same to be published; also mailed a copy of such notice and a copy of the complaint to the defendant at his address given in the affidavit of the plaintiff. This notice required the appearance of the defendant on or before December 24, 1924.

December 19, 1924, defendant appeared specially and moved to quash the service of notice upon several grounds, one of which was that the affidavit was not in compliance with the statute and insufficient to warrant publication. December 24, 1924, the Court sustained said motion, holding that the affidavit was insufficient to comply with the law, quashed the service of the notice, and granted leave to the plaintiff to file a new affidavit and proceed to serve process anew by publication.

A new affidavit was filed December 29, 1924, but after the filing thereof, the clerk of this court did not sign, seal, and issue a notice of pendency of suit, nor did the clerk of this court direct or cause any notice of pendency of suit to be published; but the plaintiff and her attorney caused a notice of pendency of suit to be published in *The Workman*, a weekly newspaper published in the Republic of Panama, without obtaining the issuance of an original thereof by the clerk. The notice so published required the appearance of the defendant on or before May 2, 1925. It was published in said paper January 31 and February 7 and 14, 1925, and the clerk certifies to the publication thereof, but does not certify that he caused such publication to be made.

First on February 25, 1925 and again on March 13, 1925, the defendant by special appearance moves to quash the service of notice by publication upon four different grounds; but as the determination of one of them will dispose of the motion, the others will not be decided.

The third ground of the amended motion is:

Third. Said publication was made without, and in the absence of, any request or order of the clerk of this court, and was made without the knowledge or the authority of said clerk.

Under the Canal Zone procedure, an action is deemed commenced when the complaint is filed with the clerk. (C. C. P., sec. 45.) The process by which the defendant is brought in to defend an action is a writ or summons issued by the court or a judicial officer. (C. C. P., sec. 1. Divorce Code, sec. 15, T. and A., 285.) The clerk is the judicial officer charged with the issuance of the summons and notice of pendency of suit, as provided by section 15 of the Divorce Code. There is no distinction between the summons and the notice of pendency of suit as these terms are used in this code. They constitute the process by which the defendant may be brought in to defend, and by the service of which in the manner pointed out in the Divorce Code, the court acquires jurisdiction to try the case and enter a decree. After the prerequisite conditions have been observed, it is the issuance of process by the court or officer charged with the duty to issue it that gives life and validity to the process. To give such process the efficient power to compel the appearance of the defendant, or to give

the court jurisdiction to enter a decree, it must be dignified by the seal of the court and attested by the signature of the clerk. (*Jewett vs. Garrett*, 47 Fed., 625).

The summons in this action was regularly issued and was returned by the marshal to the clerk and filed by him, showing that the defendant could not be found within the jurisdiction of this court. Such summons thereupon became dead except as it is made evidence of one of the facts upon which the clerk may order publication of notice. The first affidavit filed by the plaintiff herein was found so defective that legal service by publication could not be declared thereon—so defective that the court could not acquire jurisdiction to pronounce judgment in the case. It followed of course that the notice issued pursuant thereto became void and of no force or effect; for where constructive service of process by publication is substituted in place of personal service of process, there must be a strict compliance with the statutory provision relating thereto, and if such compliance is not disclosed the entire proceedings for constructive service fall.

Muldoon vs. Muldoon, 3 C. Z. Rep., 475.

Galpin vs. Page, 85 U. S., 369.

Settlemeier vs. Sullivan 97 U. S., 444.

Cheely vs. Clayton, 110 U. S., 701.

When the plaintiff filed her second affidavit for service of notice by publication, it was the duty of the clerk, if he was satisfied with the regularity of the proceedings up to that point, to issue a new notice of pendency of suit as the process of the court designated by the statute for bringing in the defendant for his defense. Until such notice was signed by the clerk, and the seal of the court was affixed thereto after the filing of the plaintiff's second affidavit, there was no process of the court issued.

The Divorce Code does not give to the plaintiff or her attorney the right to issue such process as is the case in some jurisdictions in the States; but the statute does require the clerk to perform such duty. (Divorce Code, sec. 15.) This code provides that the clerk shall cause the publication to be made, etc. This signifies that it is the duty of the clerk, after the issuance of a notice of pendency of suit in a divorce action, to designate the newspaper in which the notice shall be published after satisfying himself that such newspaper is one that falls within the provisions of the law in question. The plaintiff or her attorney may not dictate to the clerk in what newspaper such notice shall be published, for the law does not give them, or either of them, that right. The clerk may follow the wishes of litigants in such matters, so long as the requirements of the statute are met; but he is not required so to do.

Because there was no process issued in this case by the clerk after the filing of the plaintiff's second affidavit for service of notice by pub-

lication, and because the clerk did not cause the notice to be published, nor designate the newspaper for publication, the third ground of the defendant's amended motion to quash service, filed March 13, 1925, is sustained, and the notice of suit as published in *The Workman* and the service thereof by such publication be and the same are hereby quashed.

The Court has not examined the question raised by the second ground of the defendant's amended motion as to whether the return on the original summons filed in the clerk's office September 11, 1924, may still be used as evidence of the fact that the defendant can not be found in the Canal Zone, and as one of the bases for ordering a new publication; nor has counsel for either side cited any authorities upon this question, and the Court is not deciding the question, but the Court suggests that it may be advisable for the plaintiff, if she elects to proceed further with publication by notice and as a precautionary measure, to have an alias summons issued and have a return made thereon to that effect if the defendant can not now be found on the Canal Zone. Such procedure would be proper and would avoid the possibility of such question being again raised at a subsequent time.

DORAN, *et al.*, versus S. S. "PRESIDENT VAN BUREN."

(District Court, Canal Zone, Balboa Division, April 3, 1925.)

Civil No. 679.

1. ADMIRALTY. SEAMEN-MUSICIANS.

Whether musicians employed on board a passenger vessel, whose sole duty is to furnish amusement to passengers, are seamen under provisions of R. S. 4612, not decided.

2. ADMIRALTY. SEAMEN. SHIP'S ARTICLES. PAROLE EVIDENCE TO VARY. POWERS OF MASTER.

The voyage of the S. S. *President Van Buren*, as specified in the ship's articles which the libellants signed, ended at San Francisco. The libellants were advised of that fact before signing the articles. The owner was not thereafter bound to employ the master or any member of the crew for another voyage, and the master and members of the crew were at liberty to refuse further employment on the vessel. Libellants claimed damages for breach of oral contract with the master by which they were to be employed for the entire trip around the world. Held (1) that the master had no authority to bind the ship and/or its owners beyond the end of the voyage: (2) that the oral contract with the master, made without authority, does not bind the ship and/or its owners, and evidence of such oral contract under the circumstances of this case can not be considered in contradiction of the ship's articles.

3. ADMIRALTY. SEAMEN. DISCHARGE. MUTUAL RELEASE.

The discharge of libellants at San Francisco, and their signature to the mutual release provided for in R. S. 4552, before a shipping commissioner, conclusively

bound the libellants in the absence of fraud or coercion. By reason thereof libellants may not recover for their expenses and return to Balboa.

Proctor for libellants, *E. M. Robinson*.

Proctors for respondents, *Fabrega and Arias*.

MARTIN, District Judge. The libellants, by their amended libel, each seek to recover by a proceeding *in rem* against the steamship *President Van Buren* and its owners, The Dollar Line Steamship Company, the sum of \$1,537, with costs, each of them claiming \$537 actual damages and \$1,000 for mental pain, humiliation, anguish, and distress. It is alleged in the amended libel that on August 15, 1924, the libellants entered into an oral agreement with Captain J. M. Lane for their employment in the capacity of musicians aboard the steamship *President Van Buren* which was then in the harbor of Balboa, at the rate of \$60 per month and emoluments to which seamen are entitled, for a voyage around the world lasting approximately three and one-half months; that they entered upon said employment on said date and performed services as musicians on said vessel during its voyage to the port of San Francisco; that in San Francisco they were discharged and were refused employment on said vessel for the remainder of its voyage around the world, and that such discharge was wrongful, resulting to them in the loss of wages, sustenance, and expenses of travel to their homes at Balboa in the Canal Zone, and in mental pain, humiliation, anguish, and distress.

The Dollar Line Steamship Company, a corporation, owner and claimant of the steamship *President Van Buren*, in its answer denies substantially all of the material allegations of the libellants' complaint except that it admits that the libellants were employed as musicians on the *President Van Buren* from Balboa to San Francisco, where the said voyage was to end; admits that the libellants were discharged at the port of San Francisco and there signed a mutual release before the United States Shipping Commissioner, as provided by law. In said answer it is denied that the libellants are entitled to any recovery whatsoever. Specially answering, the Dollar Line Steamship Company alleges its ownership of the *President Van Buren* (that the libellants had no capacity to sue; that the libellants have no cause of action in admiralty even assuming that the allegations of the libel were true; and that the execution of the mutual release before the U. S. Shipping Commissioner at San Francisco constituted a settlement of all claims for wages as against the master and/or owners of the steamship *President Van Buren* in respect to the past voyage or engagement; and prays that the libel be dismissed, with costs.

The facts, except some which will be stated in the opinion of the Court, are substantially as follows:

The steamship *President Van Buren* left New York on its route to San Francisco via the Panama Canal without two of its four musicians constituting the orchestra on the *President Van Buren*. Shortly before the vessel reached the Canal Zone the master in charge of the vessel, Capt. J. M. Lane, radioed the agent of the Dollar Line Steamship Company at Balboa to secure the services of two musicians. This fact was communicated to the libellants in this case, and on August 15, 1924, they went on board the ship at Balboa for the purpose of satisfying the officers in charge of the ship that they could perform the services expected of them and negotiating with the master for employment as musicians. The libellants demonstrated their ability to the satisfaction of the purser and they were then taken and introduced to Captain Lane, the master of the Vessel. The evidence of the libellants is to the effect that Captain Lane told them he had authority to sign them on only as far as San Francisco as himself and all members of the crew would then be discharged, and such as cared to continue the voyage would have to sign new articles there; that the master promised them that they should have employment for the remainder of the trip around the world and until December 5, 1924; that the master told them there were nine chances to one that they would be so employed, and that he had the say so concerning the matter. The libellants say that they concluded from this that they were being employed for the entire trip around the world. They signed the ship's articles, which designated the end of the voyage as San Francisco. These articles were signed by all of the other members of the crew and persons employed on board the ship. The libellants were designated in the articles as "musicians" at \$60 per month and meals and berth. The ship left Balboa August 15th and arrived at San Francisco some 12 days later. During the voyage the libellants performed the stipulated services as musicians but were not required to, and did not perform any other service on board the ship. Upon arrival at San Francisco, as the libellants testified, they were told that their services were satisfactory, and the purser informed the libellants they they would have to see a Mr. Ashmun, agent of the Dollar Line Steamship Company, whose office was on the dock, about signing for the remainder of the voyage around the world. The libellants were discharged at San Francisco and given the certificates of discharge by the U. S. Shipping Commissioner, as provided by Revised Statutes, section 4551, and at the same time the master and the libellants executed the mutual release provided for by Revised Statutes, section 4552. Up to this point the libellants made no protest against the amount of their wages or the fact that they were being discharged, or against the execution of such release. The libellants thereafter went to Mr. Ashmun, and after some negotiations with him they were

told that they would not be signed on the *President Van Buren* but that if they would wait for 2 weeks he would, if possible, arrange for them to be signed on the *President Hayes* for the remainder of the voyage around the world. When the *President Hayes* arrived, the libellants were informed that they would not be signed on for the voyage on that vessel, and the Dollar Line Steamship Company declined to furnish transportation from San Francisco to Balboa for the libellants.

The libellants' testimony as to what occurred at the time they were employed at Balboa is contradicted in some respects by the testimony of the master, Captain Lane, and Mr. Arosemena, the agent of the Dollar Line Steamship Company at Balboa. According to the testimony of these two witnesses, the libellants were told that the captain had no authority to hire the libellants further than San Francisco; that that was the end of the voyage so far as the master and the crew were concerned; that on reaching San Francisco he would do his best to get them employment for the remainder of the voyage around the world, and the chances were nine to one that they would get such employment. It is denied by these two witnesses that the master told the libellants that he had the say so as to their employment at Frisco, and it is denied by them that the master promised the libellants anything except to endeavor to secure the employment of libellants at Frisco.

The master testifies further that the ship's articles designated San Francisco as the end of the voyage; that he was employed as master and captain only until the vessel reached San Francisco; and that upon the arrival of the vessel there the Dollar Line Steamship Company might discontinue the employment of the master and/or the members of the crew if it chose so to do, and that the master and the members of the crew, if they so elected, could refuse to continue with the vessel farther, and that it was necessary when the vessel reached San Francisco for the master and all the crew, thereafter in charge of the ship, to sign new articles.

1. It is urged by the respondent in this case that, the libellants having been employed as musicians and serving on board the ship in that capacity, are not seamen; that the contract with them is not a maritime contract and that the court has no jurisdiction thereof. With respect to this matter, the Court does not find it necessary to determine whether the libellants were or were not seamen as defined in R. S. 4612, and the point is not, therefore, determined by the Court, but will be left to future decision in any case which may arise involving the question and requiring the necessity for the determination thereof. It may be observed in passing, however, that the only service which the libellants were bound to render under their employ-

ment was to play in an orchestra devoted to the diversion, amusement, and pleasure of the passengers on board the vessel, and if such services render them "seamen" within the meaning of the statute, then a professional dancer employed to teach passengers dancing, a dramatic reader employed for the purpose of amusing the passengers, a professor employed to teach the passengers Spanish or other foreign language, the members of an opera or dramatic troupe employed to furnish amusement for the passengers, would all fall within the definition of "seamen" as used in the statute when employed on board a vessel navigating the sea. Inasmuch, however, as the libellants were required to and did sign the articles which were required to be signed by the seamen on board the *President Van Buren*, and upon discharge were designated in the certificate of discharge as "seamen" serving in the capacity of musicians, and signed the mutual release required by law to be signed by seamen, being designated therein as "musicians," the Court will assume for the purpose of this case, and for such purpose only, that they were seamen.

2. The Court is concerned at the outset with the question of the binding effect upon the respondent of the oral contract alleged in the libellants' complaint, taken in connection with what ensued subsequently, as evidenced by the acts and conduct of the libellants and the master of the *President Van Buren*. It will be observed that the evidence is without dispute that the articles which the libellants signed, and which were uniform with the articles signed by all the other members of the crew of the *President Van Buren*, designated the termination of the voyage at the port of San Francisco. The master and all the members of the crew were at liberty there to leave the employment of the respondent. And the Dollar Line Steamship Company was at liberty to refuse to employ the master or any member of the crew at that port, under the undisputed evidence. That being the termination of the voyage, and such being the contractual relations between the respondent and the master and the members of the crew, including the libellants, the question naturally arises whether the master had the authority to make a contract binding upon the respondent for the employment of the libellants beyond the port of San Francisco. In *The Aurora* (1 Wheat, 94 at 101), the rule is stated as follows, with respect to the authority of the master:

But the authority of the master is limited to objects connected with the voyage, and if he transcend the prescribed limits, his acts become in legal contemplation, mere nullities.

This doctrine has been followed by the Federal courts of the United States and the United States Supreme Court. (*The Solveig*, 103 Fed., 324. *The Kate*, 164 U. S., 465-466.) In other words, the master, so long as he is employed and in charge of the vessel, and while the

vessel is on its voyage, may make such contracts as necessity and emergency may demand as will enable the ship to complete its voyage, and will thereby bind the owners of the ship and the ship itself. The emergency confronting the master of the *President Van Buren*, at the time the libellants were employed, required the employment of two musicians, and the master employed the libellants in the capacity of musicians, as shown by the articles, to the port of San Francisco. The undisputed evidence shows that the master notified the libellants at the time of the employment and before they signed the articles the exact situation; that is, that he had no authority to employ them farther than the port of San Francisco; that that was the end of the voyage; that at that port the libellants and all other members of the crew would be discharged, and if they continued on the ship beyond the port of San Francisco they would have to sign a new set of articles for the next voyage. Under such circumstances the Court is compelled to hold, and it does hold, that the oral contract alleged in the libel for the employment of the libellants by the master of the *President Van Buren* for a trip around the world was, if made, without the authority of the Dollar Line Steamship Company, and did not bind the Dollar Line Steamship Company or the ship for the payment of wages or damages for a breach of the alleged contract as charged in the libel.

3. It is, however, contended by the libellants that they made demand on the respondent, the Dollar Line Steamship Company, to return them to the port of Balboa, and they make a claim in the libel for the expense which they incurred in returning to the port of Balboa. The libellants went on board the *President Van Buren* voluntarily. Whether the articles which they signed are valid or not, they can not recover for the expense of returning from the port of San Francisco to the port of Balboa without a contractual provision for the payment by the respondent of such expense. They do not claim that there was any such agreement, either in the libel or in their testimony, and there is nothing to show that the articles contained any such provision. They are not, therefore, entitled to recover anything on account of the expense incurred by them in returning to the part of Balboa. (Occidental, 101 Fed., 997.)

4. At the port of San Francisco, without protest on the part of libellants, they were discharged and were paid their wages earned on the trip from Balboa to San Francisco, and were each given a certificate of discharge. (Government's exhibits Nos. 1 and 2.) At the same time, without protest, they signed the mutual release provided for in R. S. 4552, wherein it is provided that:

Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto on account of wages in respect to the past voyage or engagement.

In the case of *Patterson vs. The Empire Transportation Co.*, 111 Fed., 931 (9th C. C. A.), the provision of R. S. 4552, above quoted, is construed along with other statutory provisions, and it is there held that when such mutual release is signed before a shipping commissioner, that the parties are conclusively bound thereby with respect to all matters relating to the past voyage or engagement, and that such mutual release can only be impeached for fraud or coercion. There being no fraud or coercion shown in this case, the Court must hold, and it does hold that the execution of such release by the libellants precludes them from recovering in this action anything whatsoever as claimed in their libel.

Let judgment be entered herein dismissing the libellants' libel without costs.

IN RE NUÑEZ.

(District Court, Canal Zone, Balboa Division, April 6, 1925.)

Civil No. 698.

1. CANAL ZONE. IMMIGRATION REGULATIONS. ALIEN. DEPORTATION. DEFINITION "EXCLUDE" AND "EXCLUDED." *HABEAS CORPUS*.

Questions in this case arise on *habeas corpus* proceedings. It appears that petitioner is a citizen of the Republic of Cuba; that he arrived at Cristobal, in the Canal Zone, March 11, 1925, in transit to the Republic of Panama; was permitted to land and transit the Canal Zone to Colon, R. P.; that on March 22, 1925, he was arrested by the Colon police under order of the Governor of Colon, and was sent in a Colon police van to the common jail in Cristobal, in the Canal Zone, together with two other persons, for exclusion or deportation. Proper proceedings were had before the quarantine (immigration) authorities, resulting in a finding that petitioner was an undesirable person, and on April 3, 1925, the Governor made an order directing the deportation of the petitioner as an undesirable, certifying that such disability existed at the time of petitioner's entry into the Canal Zone. Held:

1. Under Executive Order of September 13, 1923 (E. O., 337), the Governor of The Panama Canal may delegate to a subordinate officer or board the right and authority to make an order of deportation or exclusion in a proper case after a legal hearing.
2. That the terms "exclude" and "excluded," as used in such Executive Order, comprise the power to prevent persons from entering the Canal Zone when seeking entry, and also the power to deport persons found in the Canal Zone who are subject to exclusion or deportation.
3. Where one who is detained pending a hearing to determine the question of his deportation institutes a *habeas corpus* proceeding, the Court has the power to continue the *habeas corpus* hearing for a reasonable time to enable the immigration officers to complete the deportation hearing and to make their findings and orders therein.

4. Where, at the time of the final hearing in the *habeas corpus* proceedings, it appears that the petitioner has had a lawful hearing before the proper immigration authorities, and that a legal order of deportation has been duly and regularly made, the writ of *habeas corpus* will be discharged. Whenever any person is found in the Canal Zone and there is reasonable ground to believe such person to be subject to deportation, the authorities of the Canal Zone may arrest and detain such person for a reasonable time until a hearing can be had in a proper manner to determine whether such person shall be ordered deported.
5. It is a settled rule that if any essential fact necessary to the making of a valid order of deportation is unsupported by substantial evidence, the court may intervene by a writ of *habeas corpus*.
6. Where, in a deportation proceeding, the person detained for deportation fails or refuses to fully explain to the immigration authorities the facts and circumstances concerning his presence in the country, and his purpose in being there, the immigration authorities are warranted in inferring therefrom that he entered the Canal Zone with a dishonest purpose and intention.

2. INTERNATIONAL LAW. IMMIGRATION. DEPORTATION.

It is an accepted maxim of international law, that every sovereign nation has the power, inherent in its sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and on such conditions as it may see fit to prescribe. The reception into the territory of a sovereign nation is a matter of pure permission or simple tolerance and creates no obligation, and the Government may, when the interests of the country require it, exclude or deport foreign undesirables, and the right so to do can not be granted away or restrained on behalf of anyone. The right of such alien to remain in the country of a foreign Government is purely a political one and may be terminated at the will of such Government without notice to the alien of intention so to do.

3. ALIENS. DEPORTATION. TREATY RIGHTS.

Where the petitioner was arrested by the authorities of Panama on a charge of being a "pimp," and when the Panaman authorities sent him into the Canal Zone as an undesirable, the petitioner having entered the Republic of Panama through the Canal Zone, with a request to our immigration officials that he be excluded or deported, it was the duty of the immigration authorities of the Canal Zone under the treaty with the Republic of Panama to take charge of the petitioner, investigate the case, and if petitioner was found to be an undesirable, to exclude or deport him. While the Canal Zone is not bound to honor the request of the Republic of Panama in such case, such request should have persuasive effect with the immigration authorities of the Zone in leading them to take jurisdiction of the matter, investigate the case, and take such action as the facts and law warrant.

4. ALIENS. DEPORTATION. ACTS COMMITTED IN FOREIGN COUNTRY.

Where the petitioner entered the Canal Zone and passed over the same into Colon in the Republic of Panama, which is immediately adjacent to a populous portion of the Canal Zone and to which the people of the Canal Zone have free access, and where petitioner there committed acts which showed him to be a menace to the health and peace of the people of the Canal Zone resorting to the city of Colon, such acts are sufficient to show that the petitioner should have been excluded from entry into and passage over the Canal Zone, and he may be properly deported.

5. ALIENS. DEPORTATION.

Where the facts disclose that a person entering the Canal Zone territory and transiting it to the Republic of Panama, was at the time of entry an undesirable person, his entry into the Canal Zone is illegal, and when thereafter the facts are discovered which show such illegal entry and grounds for exclusion at the time of entry, such person may be deported after a proper hearing and upon a proper order.

Attorneys for petitioner, *W. C. Todd* and *L. S. Carrington*.

For the Government, *F. Edw. Mitchell*, District Attorney and *J. J. McGuigan*, Assistant District Attorney.

MARTIN, District Judge. Nuñez filed a petition herein on the 25th of March, 1925, praying for the issuance of a writ of *habeas corpus*, alleging that he is a citizen of the Republic of Cuba; that he arrived at Cristobal, in the Canal Zone, March 11, 1925, as a passenger from Cuba in transit for the Republic of Panama; was permitted to land and to transit the Canal Zone to Colon, in the Republic of Panama for the purpose of legitimate business; that on March 22, 1925, he was arrested, placed in a van, and taken to the jail at Cristobal, where he is detained without any cause or knowledge for said arrest and detention; that he has committed no offense against the United States or the Canal Zone, or the Republic of Panama; he is not a pauper dependent on public support, but has sufficient funds to carry on his business in the city of Colon, "and is at present negotiating lawful business in said city of Colon;" that Cristobal, where he landed on the 11th day of March, 1925, is the only port of landing at the Atlantic end of the Panama Canal through which passengers destined to the Republic of Panama can land; that he did not come to the Canal Zone to reside therein, and has no intention of staying in said territory; that he was practically kidnapped in foreign territory and rushed into the common jail at Cristobal, Canal Zone, against his will and without his consent. March 26, 1925, a writ of *habeas corpus* was issued by the court, returnable March 28, 1925. On said latter date L. C. Callaway, captain of the Canal Zone police and keeper of the common jail at Cristobal, Canal Zone, appeared with said petitioner in custody, and thereupon, it appearing to the Court that exclusion proceedings were being taken by the Canal Zone authorities against the petitioner, the cause was continued until April 6, 1925, at 11 o'clock a. m.

On said latter date, the said Callaway made return to said writ, alleging that the petitioner has been detained by him in his capacity as captain of the Canal Zone police force in the common jail at Cristobal, Canal Zone, on direction of the quarantine authorities of the Canal Zone exercising the power and authority of immigration officials, pending the determination of the question whether the petitioner

should be excluded from the Canal Zone; that the said petitioner was given a hearing before such immigration authorities on the first day of April, 1925, and that on the third day of April, 1925, the immigration authorities certified to the Governor of the Canal Zone that such hearing had been had, and finding that the petitioner:

* * * is an undesirable; that he is a person of notoriously bad character and that his presence is and would be a menace to the public health and welfare of the Canal Zone, and had I known his character as disclosed to me at the hearing I would have excluded him at the time of entry. I now find that such disability existed at the time of such entry, and, therefore, under the powers vested in me by law, I hereby do exclude the said Manuel Vinent Nuñez as an undesirable as aforesaid.

On the same date, the Governor of The Panama Canal entered an order finding that the said Nuñez is an undesirable within the meaning of the law; that he has a notoriously bad character and his presence is and would be a menace to the public health and welfare of the Canal Zone; and confirming the order of the immigration officer ordering his exclusion. A reply to the return was filed, in which the petitioner denied that his character was notoriously bad; alleged that the immigration officer of the Canal Zone was without jurisdiction to hear or determine any matters or things as a reason for the exclusion or deportation of the petitioner; that the petitioner was admitted to said Republic of Panama in the city of Colon, and only passed through the Canal Zone port at Cristobal for the purpose of reaching his final point of destination; that said return shows that the evil complained of by the immigration officer is an evil permitted and allowed in the Republic of Panama by the laws thereof; that the Governor of The Panama Canal was without authority and jurisdiction to issue any order of exclusion or deportation against the petitioner based on any acts committed by the petitioner in the Republic of Panama which were not committed against the Government of the Canal Zone or any inhabitant therein, since whatever was done by the petitioner was done under a law and with the permission of the Government of the Republic of Panama. .

It appears from the record in this case that the petitioner arrived at Cristobal, in the Canal Zone, March 11, 1925, on board the steamship *Sixaola*; that he was accompanied by a woman whom the petitioner claims is his wife. His name, as appeared from the ship's papers, was "Manuel Viente," and he was designated as a "merchant." He was permitted by the immigration authorities to land at Cristobal and he transited the Canal Zone shortly thereafter to the city of Colon, in the Republic of Panama, where he remained until the 22d day of March, 1925. From the 12th of March to the 19th he was under observation by the police authorities of Colon, Republic of Panama, and on the 19th, at midnight or thereabouts, he was found locked in a room with a prostitute in the restricted district (red light district) in

the city of Colon, by the Colon police, and was arrested, charged with being a "pimp." He gave bail and was given his liberty. On the evening of the 22d of March, 1925, he was again arrested by the Colon police under an order of the Governor of Colon, and was sent in a Colon police van to the common jail at Cristobal, in the Canal Zone, together with two other persons, for exclusion or deportation. C. A. Hearne, immigration officer at Cristobal, was notified on March 22, 1925, that the petitioner and the other two men were being sent to the Canal Zone for exclusion or deportation by the Canal Zone authorities, whereupon, on the 23d of March, 1925, the said immigration officer directed Captain Callaway, district commander of the Canal Zone police at Cristobal, to detain the petitioner until a hearing could be had. Such was the situation when this action was begun. On March 28, 1925, said immigration officer again directed the said district commander of the said Canal Zone police at Cristobal to detain the petitioner until a hearing could be had. April 1 the said immigration officer held a hearing at the police station in Cristobal, at which the petitioner, the immigration officer in question, Carlos Garcia O., detective of the Colon police force, and Lieut. Braulio Aguilar C., of the Colon police force, and L. H. Dietrich, Zone police officer, were present. Prior to this time, as shown by the certificate of the immigration officer, the same being undisputed in this case, the petitioner was notified of the time and place of such hearing, and that he might be present in person and by counsel if he so desired, and that on the morning of the hearing, after waiting some time for the appearance of counsel and none appearing, he proceeded to take testimony. The petitioner was sworn and testified that he was born in Santiago, Cuba; came to Colon on a Cuban passport; that he is a merchant, is married, arrived at Cristobal on the steamship *Sixaola* with his wife; that his wife left for Kingston and Cuba on the 17th or 19th of March; that they lived at the Hotel Paris in Colon; that he now has a room near 10th Street and Broadway, in the Rosanna building; that he came to Colon for business, to buy a hotel or cantina; that he does not know any persons in the red light district; that he knows two pimps who have women there, being the two Frenchmen who came to jail with him; that he visited the red light district and had intercourse with a woman there twice; and he was then asked the question: "Do you want to say anything else?" Answer: "No, not now." The record of the hearing shows that "He was then advised he could make a declaration later on if he so desired." The testimony of the detective and the lieutenant of police of Colon was then taken, showing that these two persons had him under observation from the 12th or 13th of March; that they usually saw him in the locality of the red light district and in the district; that he was seen in company with Larras-

con and Coulomb, the two pimps who were arrested with him, and with Andrea Albano, a well-known pimp; that he was seen in the company of prostitutes in the district; that when he was arrested on March 19 at midnight he was in the district in a room with a prostitute; that the Rosanna Building, where the petitioner had his room, at the time he was arrested on the 22d of March, 1925, has a very bad reputation, and that it is a resort for pimps and prostitutes. At the conclusion of the taking of testimony at this hearing, it appears that the accused was asked if he cared to make any further statement and he made the following:

When I was arrested, I was there in the Hotel Paris with four others, watching them playing cards. I was only looking on. I was watching them when the detective came in and took me.

He was then asked if he had anything else to say, but said that was all. And upon this record the immigration officer made the finding April 3, 1925, that the petitioner was an undesirable, and ordered his exclusion, and the Governor made his order confirming the findings of the immigration officer April 3, 1925, and ordering the exclusion of the petitioner. It appears from the evidence adduced upon this trial that the port of Cristobal, at the north end of the Canal Zone, is the port through which persons desiring to go to Colon and the Republic of Panama and other places in Panama, usually land. The town of Cristobal, adjacent to the port, is separated from the city of Colon only by a street. Colon is a place of 28,000 people, while Cristobal is a place of 2,500 to 3,000. Fort Sherman, Fort Randolph, the navy base at Coco Solo, Fort Davis, Fort Gatun and the town of Gatun are all in the Canal Zone and all within a radius of 8 miles of the city of Colon. The evidence discloses that there are within such radius of the city of Colon, resident upon the Canal Zone, some 12,000 to 15,000 people comprising soldiers of the U. S. Army, sailors of the U. S. Navy, and employees of The Panama Canal and Panama Railroad, more than half of the latter being white Americans; and that all these places are connected with Colon by railroad or highways, or both. It further appears that the residents of Colon freely enter the Canal Zone and that the residents of the Canal Zone freely enter the city of Colon.

Upon this record it is insisted by the petitioner that his detention is unlawful for the following reasons:

1. That after he was permitted by the immigration officials of the Canal Zone to land at the port of Cristobal and transit the Canal Zone to the Republic of Panama without being excluded, that the immigration authorities, upon his being brought into the Canal Zone thereafter by the Panamanian authorities, had no jurisdiction to order his exclusion or deportation.

2. That the Canal Zone immigration authorities had no power to order exclusion or deportation at the request of the Governor of Colon, Republic of Panama.

3. That, having entered the Republic of Panama in a proper manner, he was not subject to exclusion or deportation either by the Republic of Panama or the Canal Zone unless he committed some offense against the laws of Panama or the Canal Zone, and that the Canal Zone authorities had no power to exclude or deport him for the commission of an offense against the Republic of Panama, and what the petitioner did in Panama was lawful and permitted by the Republic of Panama.

4. That the immigration authorities had no power to make an order of exclusion or deportation against the petitioner for a cause arising after the petitioner had entered the Republic of Panama and for acts committed by the petitioner in the Republic of Panama, if any were committed by him, which might have been a cause for exclusion or deportation if such acts were committed in the Canal Zone.

5. That the immigration authorities at Cristobal had no power or authority to make an order of exclusion or deportation, and that such power could only be exercised by the Governor of The Panama Canal, and that the order made by the Governor of The Panama Canal on April 3, 1925, directing the exclusion of the petitioner, did not and could not cure the irregularities of the immigration officials prior to that time and make the detention of the petitioner lawful at the time the writ of *habeas corpus* was issued in this case.

6. That the evidence taken before Hearne, immigration officer, did not warrant the finding that petitioner was an undesirable or the order of exclusion.

The 5th point above made will be considered first:

1. Under the provisions of section 10 of the Act of Congress, approved August 21, 1916 (Treaties and Acts, 132):

The President is hereby authorized to make rules and regulations, and to alter or amend the same from time to time, touching the right of any person to enter or remain upon or pass over any part of the Canal Zone; for the detention of any person entering the Canal Zone in violation of such rules and regulations, and return of such person to the country whence he or she came, on the vessel bringing such person to the Canal Zone, or any other vessel belonging to the same owner or interest, and at the expense of such owner or interest.

The President promulgated the Executive Order of February 6, 1917 (E. O., 220), wherein it was provided that:

The Governor of The Panama Canal is hereby empowered to exclude or to cause to be excluded the following classes of persons from the Canal Zone: * * * persons of notoriously bad character, persons whose presence would be a menace to the public health or welfare of the Canal Zone, and others whose presence in the judgment of the Governor would tend to create public disorder or in any manner impede the prosecution of the work of opening the Canal or its maintenance, opera-

tion, sanitation, and protection; and the Governor may expel from the Canal Zone and deport therefrom any person * * * whose presence in the judgment of the Governor would tend to create public disorder or in any manner impede the prosecution of the work of opening the Canal or its maintenance, operation, sanitation, or protection.

Under this Executive Order the Governor was without power to delegate to a subordinate the right to make an order deporting persons from the Canal Zone. And if the Court's decision were to be rested upon such Executive Order, the Court would be compelled to hold that any order of deportation made by any subordinate officer would have no binding force or effect unless and until the same should be ratified and confirmed by the Governor. But by the Executive Order of September 13, 1923 (E. O., 337), section 1 was amended so as to read:

The Governor of The Panama Canal is hereby empowered to exclude or cause to be excluded the following classes of persons from the Canal Zone: * * * persons of notoriously bad character persons whose presence would be a menace to the public health or welfare of the Canal Zone * * * and all other persons whose presence in the judgment of the Governor would tend to create public disorder or in any manner impede the prosecution of the work of opening the Canal or its maintenance, operation, sanitation, or protection.

The Court holds that the terms "exclude" and "excluded," as used in this Executive Order mean the exercise of the power to prevent persons from entering the Canal Zone when seeking entry, and also the power to put out or deport persons found in the Canal Zone who are subject to deportation. Under the latter Executive Order the Governor has the power to exclude or deport any person falling within any of the classes designated in such Executive Orders and has the undoubted authority to delegate to a subordinate officer the power to put out, as well as the power to keep out, any person not entitled to enter under the law or deportable for reasons specified in the law. The delegation of such power was exercised by the Governor on the 27th of March, 1925, when Circular No. 714-3 was made and published. In section 1 it is provided,

The Division of Quarantine shall be charged with the exclusion of undesirable persons referred to in the above-mentioned Executive Orders (Order of February 6, 1917, as amended September 13, 1923), at any time that cause for such exclusion shall come to their knowledge, whether at time of entry of such person or subsequent thereto, if they so find, after hearing, that such persons come within any of the classes to be excluded; but in no case shall they act in a case of deportation for causes arising subsequent to the entry.

Under this section, the quarantine officers have the power to exclude any person falling within any of the prohibited classes designated in the Executive Order of February 6, 1917, as amended by the Executive Order of September 13, 1923, either at the time of attempted entry, or afterwards for any cause which in fact existed at the time of entry,

without action on the part of the Governor. Under section 2 of said circular, where any person has entered who does not at the time of entry fall within any such prohibited classes but where the facts show that thereafter cause has arisen warranting deportation, the Police and Fire Division is authorized to hold a hearing and certify to the Governor whether such person should be deported; but the Governor alone has the power to order deportation in such cases. Under section 3 of such circular, the Police and Fire Division are authorized, on complaint, to detain any person under charge of being subject to exclusion under section 1, or subject to deportation under section 2 of said circular, for such a reasonable time as may be needed for a hearing to determine whether such person shall be excluded or deported. Had this order been in effect on the 23d day of March, 1925, the chief quarantine officer at Cristobal would have had the authority to make an order excluding the petitioner in this case after a hearing, if the evidence taken upon the hearing, justified such order.

The question then arises, whether the court may take into consideration the Governor's circular of March 27, 1925, and the subsequent proceedings conducted by Hearne, immigration officer, on April 1, 1925, and the order of exclusion made by such immigration officer on the 3d day of April, 1925, in determining whether the petitioner is entitled to his discharge in this case. The Court holds, for the reasons hereinafter stated, that after the issuance of the Governor's Circular No. 714-3 of March 27, 1925, the power to exclude given in such circular in the cases therein specified, to subordinate immigration officials, may be exercised by the subordinate immigration officials with the same force and effect as if the Governor himself had made the order. Of course, so far as this case is concerned, the order of the immigration officer entered on the 3d day of April, 1925, having been ratified and confirmed by the Governor, such order has the same binding force and effect as if the Governor himself had made the order in the first place.

The only question left for determination on this branch of the case is the question, whether the Court had the power to continue the hearing from March 28, 1925, to April 6, 1925, to enable the immigration officials of the Canal Zone to conduct a hearing and enter an order of exclusion, if, upon such hearing, the facts justify the making of such an order. There can be no doubt but that the Court had such power and that it did not abuse such power in granting such continuance.

Mahler *vs.* Eby, 264 U. S., 2 at 42.

Mensevich *vs.* Todd, 264 U. S., 134.

In the Mahler case, a *habeas corpus* action, the Supreme Court of the United States found that the proceedings on deportation were defective and irregular, reversed the case, but directed that the discharge of the petitioner should be delayed for a reasonable time to

enable the immigration officials to conduct a proper hearing, and if justified, make an order of deportation, and ordered if that were done that the writ be discharged. Under these authorities, therefore, which are binding upon this Court, this Court has the power to delay the hearing in the *habeas corpus* proceeding to enable immigration officials to act, and, if justified, to make an order of exclusion or deportation, and upon the hearing of the case, if it appears that a proper hearing has been had and a proper order of exclusion or deportation made, to discharge the writ of *habeas corpus* for such reason. The Court holds that it has the right and the power to take into consideration the circular of the Governor issued March 27, 1925, the hearing held by the immigration officer at Cristobal on April 1, 1925, and the order of exclusion made pursuant thereto by the immigration officer, and the Order of the Governor confirming the same made on April 3, 1925, and to discharge the writ of *habeas corpus* in this case because of such things, unless there be other reasons in the case which preclude the making of such order of discharge.

With respect to the detention of the petitioner from March 23, 1925, to the date of the hearing, the Court holds that the immigration authorities have the power to order the arrest of, or to themselves take into custody, any person found in the Canal Zone where there is reasonable ground to believe such person to be subject to exclusion, and detain or cause to be detained, such person for a reasonable time until a hearing can be had in a proper manner to determine whether such person shall be ordered excluded. Exclusion and deportation proceedings would be vain if the person accused could not be detained in custody pending inquiry into his true character and while arrangements were being made for deportation. (1 R. C. L., 833.)

2. The 6th point made by the petitioner will be considered next, that is, how far the Court may inquire into the proceedings before the immigration official, and upon what grounds the Court may interfere with such proceedings or the carrying out of orders of exclusion made by him.

The rule is settled under the decisions of the United States Supreme Court that, if an essential fact necessary to the making of a valid order of deportation is unsupported by substantial evidence, the Court may intervene by the writ of *habeas corpus*.

Zakonaite vs. Wolff, 226 U. S., 272-274-5.

Bilokumsky vs. Todd, 263 U. S., 149, 153.

It is contended by the petitioner that there was no evidence before the immigration official in the hearing conducted by him on April 1, 1925, upon which the immigration authorities of the Canal Zone could make a finding that the petitioner was an undesirable person, and thereon making an order for exclusion. The evidence presented to

the immigration officer showed that the petitioner in this case seemed greatly interested in the red light district in Colon; that his only associates while in Colon were pimps and prostitutes; that while he stopped at the Hotel Paris until the 19th of March, 1925, that hotel being a respectable place, at the time of his arrest and deportation from the Republic of Panama, he had a room in the Rosanna Building, which was a place having a bad reputation and a place frequented by pimps and prostitutes; that he had sexual intercourse with two prostitutes in the red light district, and when first arrested, on the 19th of March, was found in the red light district locked in a room with a prostitute. It is true that he says that he came to Colon for the purpose of negotiating for the purchase of the Hotel Paris, for the purpose of buying a hotel or a cantina; and these may be conceded to be lawful purposes. But although he testified in the hearing before the immigration officer, he did not testify that he had begun or conducted any negotiations with any person with respect to the purchase of the Hotel Paris, or the purchase of any other hotel or cantina. He was given ample opportunity during this hearing to make his testimony under oath as full and complete as he desired to make it. After the testimony of witnesses, Garcia and Aguila, were taken in his presence, he was asked if he cared to make any further statement, and the only thing that he offered was:

When I was arrested I was there in the Hotel Paris with four others, watching them playing cards, I was only looking on. I was watching them when the detective came and took me.

A man of honest purpose and intent, pursuing a legitimate course of conduct, in a hearing in deportation proceedings where he is being charged as being an undesirable, and where he is confronted with testimony showing his associations and conduct as disclosed by the record before the immigration official, would certainly deem it necessary to offer full and complete explanation to the immigration official of his acts in coming to the Canal Zone and his conduct in the city of Colon. There was strong reason why he should have asserted his honesty of purpose and intention in entering the Canal Zone and being in Colon, if there was any basis in fact for such contention. And the fact that he did not make full and complete disclosure of his purpose in entering a Canal Zone port and being in Colon, coupled with the other facts before the immigration official, were sufficient to justify the inference on the part of such official and his consequent finding that the petitioner was a bad character and an undesirable person, and was sufficient to support an order or deportation.

Bilokumsky vs. Todd, supra.

Mahler vs. Eby, supra.

The Bilokumsky case is particularly pertinent. In that case it was charged before the immigration commissioner that Bilokumsky was an undesirable alien. The court held that proof of alienage was essential to give the commissioner authority to make an order of deportation, and that the burden of proof was upon the Government to establish alienage. When the commissioner sought to interrogate Bilokumsky as to whether he was an alien, Bilokumsky, under the advice of consul, declined to answer. In the case the Supreme Court uses this language:

"But it is not true that * * * there was no evidence of alienage at the hearing. Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character. Bilokumsky was present at the hearing personally and by counsel * * *. He presumably knew whether or not he was a citizen. * * * There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien.

And so here, the petitioner's failure to explain fully his purposes and intentions in coming to the Canal Zone and the city of Colon in the Republic of Panama, and to show that his business therein was a legitimate one, coupled with the other facts and circumstances in the case made before the immigration official, warranted the immigration official in inferring that his business in Colon was not honest and legitimate. And if not honest and legitimate, then his presence in Colon, to which some 12,000 to 15,000 soldiers, sailors, Americans, and others resident upon the Canal Zone living in the vicinity of Colon resort and to which city they have free access, constituted a menace to the health and the welfare of the residents of the Canal Zone.

The Court reaches the conclusion that the immigration officer had jurisdiction and that there was sufficient evidence before the immigration officer to warrant the finding that the petitioner was an undesirable and thereon to make an order of exclusion, and that such proceedings were conducted in such manner as to be due process of law. Such being the state of the record before the immigration officer, the Court will not interfere, for such interference would be justified only in the case there was no substantial evidence to support the finding and order of the immigration officer, or in case petitioner was not accorded a fair hearing, or in case the immigration officials had no jurisdiction to act.

3. Before proceeding to a discussion of the remaining points made by the petitioner, the Court deems it necessary to state some of the fundamental rules of law applicable generally to immigration. This will assist in a clear understanding of the further discussion of these points.

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in its sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and on such conditions as it may see fit to prescribe. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.

Chae Chan Ping vs. U. S., 130 U. S., 581.

Ekiu vs. U. S., 142 U. S., 561.

Fog Yue Ting vs. U. S. 149 U. S., 698.

Yamataya vs. Fisher, 189 U. S., 86.

The right of a nation to expel or deport foreign undesirables present in the country rests upon the same grounds as the right to prohibit and prevent their entrance into the country. This right is based on the fact that a foreigner is not part of the nation and his individual reception into the territory is a matter of pure permission, or simple tolerance, and creates no obligation. The exercise of this right may be subjected to certain forms by the administrative laws of each country; but the right exists, none the less, universally recognized and put in force.

1 R. C. L., 830.

2 C. J., 1075.

Bugajewitz vs. U. S., 228 U. S., 585.

Tiaco vs. Forbes, 228 U. S., 549.

The inherent right of a government at any time when, in its judgment, the interests of the country require it, to exclude or deport foreign undesirables can not be granted away or restrained on behalf of anyone. The right of such a person to remain in the country of a foreign government is purely a political one and may be terminated at the will of such government without notice to such alien of an intention to do so.

2 C. J., 1075.

The power to exclude or deport from Continental United States or territory under its jurisdiction is vested in Congress.

2 C. J., 1075.

Schwartz vs. Adams, 228 U. S., 592.

Bugajewitz vs. U. S., *supra*.

Zakonaite vs. Wolff, *supra*.

It is under the power of Congress to regulate and control such matters that the Act of Congress of August 21, 1916 (Treaties and Acts, 132), was enacted, giving to the President the power to declare by Executive Order what persons may be excluded or deported from the Canal Zone. This power in turn has been delegated by the President to the Governor of the Canal Zone, and by him to subordinates, and such delegation of power is lawful. (*Ex parte Deal*, *supra*.) It will be noted, however, that the power to exclude or deport a person under

the laws applicable in the Canal Zone, is broader than the rules of international law stated above. Under the rules of international law only aliens may be excluded or deported. Under the laws applicable to the Canal Zone, any person, whether citizen of the United States or an alien, may be deported for any cause stated in the laws applicable thereto.

Points 1, 2, 3, and 4, made by the petitioner as herein stated will be considered together. It is contended by the petitioner that he was permitted by the immigration officials of the Canal Zone to land at the port of Cristobal and transit the Canal Zone to the Republic of Panama without being excluded, and that thereafter he was kidnapped by the Panaman authorities and returned to the Canal Zone with a request that he be deported, after he had entered the Canal Zone at the port of Cristobal and had transitted the Canal Zone to Colon; that the Canal Zone authorities have no power to order his deportation at the request of the Governor of Colon; that he was not subject to deportation for acts committed in the Republic of Panama, and that because thereof the immigration authorities of the Canal Zone had no jurisdiction to act in this case.

The Government of the United States, under a treaty with the Republic of Panama, constructed and is operating the Panama Canal. By such treaty it is granted the perpetual use of and sovereignty over a territory 5 miles wide on either side of the center line of the Canal with the exception of the city of Colon, situated within said 10-mile grant at the north end of the Canal, and the city of Panama within such 10-mile grant situated at the south end of the Canal. (Art. 2, treaty between U. S. and Panama. Treaties and Acts, 18.) Such grant was made to the United States for the construction, maintenance, operation, sanitation, and protection of the Panama Canal and the Panama Railroad. Article 7 of said treaty (Treaties and Acts, 20), provides:

The Republic of Panama agrees that the cities of Panama and Colon shall comply in perpetuity with the sanitary ordinances whether of a preventive or curative character prescribed by the United States and in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.

Pursuant to this treaty, the United States purchased the French rights with respect to the construction, maintenance, and operation of the Isthmian Canal, and purchased the stock of the Panama Railroad Company, and thereafter the United States took possession of the territory mentioned in said treaty and proceeded to construct the Panama Canal, and to maintain and operate the Panama Railroad, and since the completion of the Panama Canal has maintained and

operated the same. It was found before the treaty was made, and in order to properly prosecute the work of constructing the Panama Canal, and thereafter to maintain and operate it, that it was necessary that sanitary measures should be taken in the Canal Zone and in the adjacent cities of Colon and Panama, to eliminate malaria and yellow fever and any other diseases or causes of disease which then existed or might thereafter exist which might become a menace to the health of the residents of the Canal Zone engaged in the construction of the Panama Canal, and in the maintenance and operation of the Panama Canal and Panama Railroad, and to insure the effectiveness of such sanitary measures as were then or might thereafter become necessary, there was inserted in the treaty the clause from Article 7 thereof above quoted.

The Isthmian Canal Commission, under and by virtue of the authority of the United States, passed certain laws and ordinances with respect to sanitary matters in the Canal Zone and in the cities of Colon and Panama in the Republic of Panama. By virtue of the sanitary measures thus taken, the United States was enabled to construct the Panama Canal and has since been able to maintain and operate it. The prevention of social diseases is of as much importance as the elimination of malaria and yellow fever. As shown by the record in this case, there is a red light district in the city of Colon wherein prostitutes are segregated from the remainder of the community. Whether this is done by the Panaman authorities by virtue of the law of the Republic of Panama, or simply as a sanitary measure, the Court is not advised, the record being silent with respect thereto. It is a matter of common knowledge that houses of prostitution are prolific sources for the spread of social diseases, and the segregation and regulation of prostitution is a measure which tends to reduce the danger of contracting a social disease. It is also a matter of common knowledge that pimps and whoremongers are menaces to the social welfare of the residents of any community or those who resort to such community. It is essential to the continued successful maintenance, operation, and protection of the Canal that the soldiers, sailors, and civilians resident in the Canal Zone shall be protected from disease and kept in a healthful condition, and the Government of the Canal Zone should and does cooperate to the fullest possible extent with the Republic of Panama in the curtailment and suppression of every source of infection within the cities of Colon and Panama in the Republic of Panama, not only as a neighborly act but for the protection of its soldiers, sailors, and civilians residing on the Canal Zone.

When the petitioner in this case was arrested by the Panaman authorities on the charge of being a pimp, and when a few days there-

after he was expelled from Panaman territory by the Panaman authorities as an undesirable and sent into the Canal Zone, where he had entered, with a request to our immigration officials that he be excluded or deported, it was the duty of the immigration authorities of the Canal Zone to take charge of the prisoner so deported to our territory and investigate the case for the purpose of determining whether he was, under Canal Zone law, an undesirable, and if found to be so, to exclude or deport him. The Court holds that it is not the duty of our immigration officials to exclude or deport a person merely upon the request of another government; but when, in any case, the Republic of Panama expels a person from Panaman territory as an undesirable and requests our immigration authorities to exclude or deport him, and when it appears that such person is shown to have entered the Republic of Panama through the ports of the Canal Zone and over its territory, and when it appears that such person is subject to exclusion or deportation under Canal Zone law, such request should have persuasive effect with the immigration authorities of the Canal Zone in leading them to take jurisdiction of the matter, promptly investigate the case, and take such action as is warranted by the facts and the law of the Canal Zone.

For the reasons above pointed out, the Court holds that, whenever a person who is believed to be an undesirable is present in the Canal Zone, regardless of the manner in which he enters into the Canal Zone, it is the duty of the immigration officials to take, or cause him to be taken into custody, to investigate the facts, and if the facts and the law justify it, to exclude or deport him even though such facts show that the acts of such person making him an undesirable were committed in Colon or Panama in the Republic of Panama, to which the residents of the Canal Zone have free access and to which they continually resort. The question of how such person gets into the Canal Zone, whether he is kidnapped or comes voluntarily, can not be inquired into in a *habeas corpus* proceeding. (*Ex parte Deal, supra.*) A person having the character of the petitioner, as the evidence shows it to be, is a menace to the health and welfare of the residents of the Canal Zone, even though the acts committed by him showing his undesirability were committed in the city of Colon in the Republic of Panama.

Another contention of the petitioner is that, because the immigration officials did not exclude the petitioner at the time of his entry into and transit of the Canal Zone; that they are now precluded from excluding or deporting him on account of acts subsequently committed within the city of Colon. This contention is not well founded. The immigration authorities of the Canal Zone did not waive the right to exclude the petitioner for causes existing at the time of his entry which

would have been sufficient to warrant exclusion because such authorities were not aware of the facts; nor should such authorities be estopped from excluding a person for causes existing at the time of the entry of such person if the facts were not known to the authorities which would have warranted exclusion at the time of entry. The immigration authorities found that the petitioner was a bad character and an undesirable at the time he entered the port of Cristobal and crossed the Canal Zone to the city of Colon. His bad character and his undesirability were not developed in the city of Colon in the short time he was there. He had these same characteristics when he entered the port of Cristobal and crossed the Zone to Colon. The fact that the immigration officials did not discover his undesirability at the time of his entry and that they did not then exclude him, does not preclude them when the facts are discovered from making an order of exclusion. A person who enters the territory of the Canal Zone and who would be subject to exclusion under the law if the facts were then known, enters such territory illegally, and when thereafter the facts are discovered which show such illegal entry and grounds for exclusion, such person may be excluded after a proper hearing conducted by the immigration authorities and the making of a proper order therefor. The Court concludes that the immigration authorities had jurisdiction in this matter; that the petitioner had a fair hearing before the immigration officials; that a proper order of exclusion was made; and that there is no ground available to the petitioner in a *habeas corpus* proceeding for his discharge from custody.

Let an order be entered that the petitioner's complaint be dismissed; that his discharge from custody be denied, and that the writ of *habeas corpus* heretofore issued be discharged and the petitioner remanded to the custody of the respondent.

HALVOSA *versus* HALVOSA.

(District Court, Canal Zone, Balboa Division, April 21, 1925.)

Civil No. 691.

1. DIVORCE. JURISDICTION. RESIDENCE.

Where a divorce action is instituted on the ground of extreme and repeated cruelty, the plaintiff's petition must allege and the proof must show that she has resided on the Canal Zone continuously for one year prior to the filing of the petition, and where the proof shows, as in this case, that the plaintiff has not so resided upon the Canal Zone for the requisite statutory time, her right to a divorce will be denied on that ground under the provisions of subsection (b) of section 13 of the Divorce Code.

2. DIVORCE. CROSS PETITION. JURISDICTION.

Where, after the filing of the plaintiff's petition for divorce, the defendant files an answer and a cross petition, and his cross petition alleges a statutory ground for a divorce and the requisite residence on the Canal Zone, the court has jurisdiction to try and determine the defendant's right to a divorce based on the allegations of such cross petition even though the plaintiff's petition be dismissed for lack of jurisdiction.

3. DIVORCE.

Where, in an action for divorce, a defendant files a cross petition alleging the jurisdictional facts necessary to give the court jurisdiction, and where the proof shows his residence for the requisite length of time on the Canal Zone, and where the plaintiff's petition is dismissed because of lack of residential qualifications to maintain the action, the plaintiff may, with leave of court after the dismissal of her petition, file a cross petition to the defendant's cross petition under the provisions of section 19 of the Divorce Code, which read: "If the original petition be dismissed after the filing of the cross petition, the defendant may proceed to the trial of the cross petition without further notice to the adverse party; and the case upon such cross petition shall in all things be governed by the same rules applicable to a case on an original petition."

4. DIVORCE. PLEADING.

Where the defendant files a cross petition and alleges and proves all of the jurisdictional facts and the plaintiff's petition is dismissed, such cross petition of the defendant stands as an original petition and as if the defendant had originally commenced the action, and the plaintiff may, with leave of court, after the dismissal of her original petition, file a cross petition to the defendant's cross petition, or otherwise plead thereto.

Attorney for plaintiff, *E. M. Robinson.*

Attorney for defendant, *Felix E. Porter.*

MARTIN, District Judge. This is an action for divorce. The original petition was filed March 3, 1925; March 12, 1925, the defendant appeared and filed an answer and therewith a cross petition, styled a "cross complaint," wherein the defendant seeks an absolute divorce from the plaintiff on the ground of extreme cruelty. March 23, 1925, the plaintiff filed an answer to the defendant's cross petition. March 31, 1925, the plaintiff filed an amended petition, wherein she seeks an absolute divorce from the defendant on the ground of extreme cruelty, alimony, and injunctive relief.

On the issues thus joined, the cause proceeded to trial, without a jury, April 11, 1925. At the conclusion of the plaintiff's evidence, the defendant moved that the plaintiff's action on her amended petition be dismissed for the reason that the proof disclosed that she was not a resident of the Canal Zone from April 13, 1924 to February, 1925. The evidence so showing, said motion was sustained and the plaintiff's action on her amended petition dismissed for the sole reason that the court had no jurisdiction thereof under the provisions of subsection (b) of section 13 of the Divorce Code. (Treaties and Acts, 284.) The

trial then proceeded upon the cross petition of the defendant and the answer of the plaintiff thereto, and on the amended petition of the plaintiff treated, under section 97 of the Code of Civil Procedure, as affirmative matter to the cross petition of the defendant. At the conclusion of the evidence, arguments were deferred until April 14, 1925, when arguments of counsel were submitted and the cause taken under advisement. Thereafter, and on the 18th day of April, 1925, the plaintiff, with leave of Court, filed herein a pleading, styled an "Amended Answer to Cross Complaint and Cross Complaint," which embodies the same matters contained in her answer to the defendant's cross petition and the matters pleaded in her amended petition, with some additional allegations to conform to the proof in the case, and said pleading was permitted to be filed by order of the Court. In said pleading, the plaintiff demands an absolute divorce from the defendant on the grounds of extreme cruelty, alimony, and injunctive relief.

The Court finds upon the facts, that the defendant is not entitled to a divorce, but that the plaintiff, on her cross petition to the defendant's cross petition, is entitled to a divorce; but upon the record, two questions of law naturally arise in the case, viz.:

1. Whether, after her amended petition is dismissed for lack of jurisdiction because of nonresidence, the plaintiff may plead the same cause of action by a cross petition to the cross petition of the defendant treated as an original petition.

2. Whether the fact that she was a nonresident of the Canal Zone for a portion of the year preceding the time of her cross action to the defendant's cross petition, is a bar to granting relief to her upon her cross petition.

As to the first question:

The applicable statutory provisions are found in subsection (b) of section 13 (Treaties and Acts, 264) and section 19 (Treaties and Acts, 286) of the Divorce Code contained in the Act of Congress, approved September 21, 1922.

Subsection (b) of section 13, applicable to this case, provides:

No person shall be entitled to a divorce in pursuance of the provisions of this Act who has not actually resided on the Canal Zone continuously during the whole year next before the filing of his or her petition.

Section 19 of the Divorce Code, provides:

"Cross petition and proceedings thereon.—In addition to an answer, the defendant may file a cross petition for divorce; and when filed the court shall decree the divorce to the party legally entitled thereto. If the original petition be dismissed after the filing of the cross petition, the defendant may proceed to the trial of the cross petition without further notice to the adverse party; and the case upon such cross petition shall in all things be governed by the same rules applicable to a case on an original petition.

Under these sections it is necessary for the Court to determine in the first place whether the quoted provisions of subsection (b) of section 13 as to residence apply to a defendant who seeks a divorce on a cross petition. The courts of Continental United States with practical uniformity have held that a defendant in a divorce action under statutes similar to ours is entitled not only to appear and answer but is entitled to file a cross petition and have such relief as the defendant's pleading and proof in support thereof may warrant, even though the defendant be a nonresident of the State where the action is brought.

19 C. J., 27.

Charlton *vs.* Charlton (Texas), 141 S. W., 291.

Jeness *vs.* Jeness (Ind.), 87 A. D., 335.

Chutton *vs.* Chutton (Mich.), 31 L. R. A., 160.

Fisk *vs.* Fisk (Utah), 67 Pac., 1064.

Abele *vs.* Abele (N. J.), 50 Atl., 686.

Pine *vs.* Pine (Neb.), 100 N. W., 938.

Ferry *vs.* Ferry (Wash.), 37 Pac., 431.

Newman *vs.* Newman (Okla.), 112 Pac., 1007.

State, *ex rel.*, Gowe *vs.* Moran (Nev.), 142 Pac., 534.

Sterl *vs.* Sterl, 2 Ill. Appls., 223.

The Court has found only one case holding a different view, namely, Valk *vs.* Valk (R. I.), 29 Atl., 499, and the reason for the Rhode Island courts so holding is not persuasive and will not be followed by this Court. The reason for the majority rule which this Court adopts, except as hereinafter stated, is that it would create a multiplicity of suits and would be unconscionable and inequitable and subversive of justice to permit a plaintiff in a divorce action to preclude the defendant from filing a cross petition for a divorce and thus prevent complete justice from being meted out to the parties in the one action. And that, in an equity case, when the court has jurisdiction of the subject matter and of the parties, that such jurisdiction will be exercised by considering all the claims of the parties and rendering such judgment as equity and good conscience dictates.

This rule was evidently in the minds of our legislators when the first sentence of section 19 of the Divorce Code was approved, for it is therein provided that:

In addition to an answer the defendant may file a cross petition for a divorce; and when filed the court shall decree the divorce to the party legally entitled thereto.

There is no mention made in this portion of section 19 barring a defendant in a divorce action brought in the Canal Zone who may be a nonresident of the Canal Zone from filing a cross petition and having such relief thereon as the pleading and proof warrant. The Court is therefore impelled to hold, and does hold, that the portion of subsection (b) of section 13 above quoted as to residence is not applicable to a defendant filing a cross petition except where the plaintiff's complaint is dismissed, a matter which will be hereinafter considered.

With such exception, no other construction will harmonize the quoted portion of subsection (b) and the first sentence above quoted from section 19 of the Divorce Code. When the two provisions are construed together it is clear to the Court that Congress intended in all cases where the Court obtains jurisdiction on the plaintiff's petition, that the defendant in the action, whether a resident of the Canal Zone or a nonresident, may interpose a cross petition for a divorce, and if the plaintiff's petition be not dismissed may have such relief as the pleading and proof warrant.

2. As to the second question:

Under the general rules above stated, where the court has in fact acquired jurisdiction on the filing of the plaintiff's petition, the defendant, on filing a cross petition need not allege nor prove residence on the Canal Zone to entitle such defendant to maintain an action on such cross petition. When the court has in fact acquired jurisdiction on the filing of the plaintiff's petition, and the defendant appears and files a cross petition, the jurisdiction of the court is complete and the court may decree a divorce to the party legally entitled thereto. To such cross petition the plaintiff may plead by way of denial, or may plead any defense which the plaintiff may have thereto, excepting lack of jurisdiction and a cross action for a divorce; for, where the court on plaintiff's petition has in fact acquired jurisdiction, the plaintiff would be estopped to plead lack of jurisdiction and a cause of action for divorce inuring to the plaintiff should be pleaded in the plaintiff's main action and not by way of cross action to the defendant's cross petition. Such are the governing rules where the plaintiff's petition is not dismissed.

What are the rules, however, where the plaintiff's petition is dismissed? Section 19 of the Divorce Code seems to supply the answer, for it is therein provided that:

If the original petition be dismissed after the filing of the cross petition, the defendant may proceed to the trial of the cross petition without further notice to the adverse party; and the case upon such cross petition shall in all things be governed by the same rules applicable to a case on an original petition.

Under this provision, if the court acquired jurisdiction on the filing of the plaintiff's petition, a dismissal resulting from abandonment of the action by, or on motion of the plaintiff, or for lack of proof on the merits, bars the plaintiff of the right to a divorce in such action, but the plaintiff may defend against the cross petition of the defendant except upon jurisdictional questions and a cross action for divorce. Suppose, however, that the plaintiff's action be dismissed upon any ground, jurisdictional or otherwise, what is then the situation of the defendant in the case? The statute says that:

* * * the case upon such cross petition (defendant's) shall in all things be governed by the same rules applicable to a case on an original petition.

I think it can not be questioned that the last-quoted portion of the Divorce Code means that in case of dismissal of the plaintiff's petition, from whatever cause, the defendant's cross petition must exhibit as complete a cause of action as is required in an original petition for divorce; that is, it must show the defendant's residence on the Canal Zone for the requisite length of time, the existence of the marriage relation, and a statutory ground of action for a divorce. This may result in the denial of a divorce to nonresident defendants in some cases where the action of the plaintiff is dismissed; but the court must ascertain and give effect to the meaning and intent of those who enact the laws and refrain from forced or unnatural construction thereof, even though the results in such cases be not just. When the statute provides that, "if the original petition be dismissed," without qualifying words, it means a dismissal from any cause whatsoever. When it says that "the case upon such cross petition shall in all things be governed by the same rules applicable to a case on an original petition," it means that after the dismissal of the plaintiff's petition the defendant becomes the plaintiff in the action and his cross petition must meet all the tests, jurisdictional and otherwise, applicable to an original petition for a divorce, and the allegations and proof must be such that the court has jurisdiction to render a valid decree thereon. Any other construction of this statute would be judicial legislation, which is forbidden. As the case then stands, the defendant on his cross petition, which alleges the existence of the marriage, the residence of the defendant for the requisite time, and a statutory ground for a divorce, occupies the position of the plaintiff in the case. What then, under such circumstances, are the rights of the plaintiff in this action with respect to her cross action for divorce pleaded in her amended answer and "cross complaint" to the defendant's cross petition? The plaintiff's action has been dismissed upon the motion of the defendant solely upon a jurisdictional ground, namely, that she had not resided on the Canal Zone the length of time required by the statute immediately prior to the commencement of her action. Because of such lack of residence the court did not acquire jurisdiction of this action until the defendant appeared and filed a cross petition. Had the defendant made no appearance, or had he answered and refrained from filing a cross petition, the court would have been compelled to dismiss the entire action on the jurisdictional ground above stated. But when the defendant filed his cross petition, meeting every test required of an original petition, the court then acquired jurisdiction of the action and, having complete jurisdiction, it had the power to hear and determine the action upon such cross petition of the defendant and the pleadings of the plaintiff filed in response thereto.

Abele *vs.* Abele (N. J.), 50 Atl., 686.

Newman *vs.* Newman (Okla.), 112 Pac., 1007.

Gibbs *vs.* Gibbs (Utah), 73 Pac., 641.

State, *ex rel.*, Howe *vs.* Moran, 142 Pac., 534.

Under such circumstances what are the plaintiff's rights as to pleading and relief? Clearly the same as if the defendant had in the first instance instituted the action. The plaintiff did not abandon her case nor dismiss it; there was on her part no failure of proof except as to the jurisdictional fact of residence. So long as the defendant's cross petition is not dismissed, the same being treated as it must be under the provisions of section 19 of the Divorce Code as an original petition, the plaintiff may plead thereto by way of denial, or by way of defense, or by way of a cross petition for divorce, and she would be entitled to such relief as her pleadings and proof entitle her, whether she be a resident or nonresident of the Canal Zone. She has all the rights under the statute and under the rules hereinbefore stated of a defendant in an original action for divorce.

There is a clear distinction under the Divorce Code as to the defendant's situation and rights in the case between a case on the one hand where the plaintiff's petition is not dismissed and a case on the other hand where the plaintiff's petition is dismissed. In the former, if jurisdiction is acquired on the filing of plaintiff's petition, the defendant need not allege in his cross petition, nor prove, residence on the Canal Zone. In the latter, his cross petition must allege and his proofs show the jurisdictional facts required by the Divorce Code.

There is likewise a clear distinction under such code as to the plaintiff's situation and rights in the case. Where the plaintiff's petition is dismissed as a result of the plaintiff's acts, as, by failure to prosecute the action, or by motion to dismiss, or because of failure of proof as to the cause of action, or upon any other ground except a jurisdictional ground, the plaintiff is debarred in that action of a right to a divorce and consequent relief. If the court acquires jurisdiction on the filing of the plaintiff's petition, the plaintiff may not defend against the cross petition for lack of jurisdiction. But on the other hand, where the plaintiff's petition is dismissed for lack of jurisdiction then the plaintiff may defend against the cross petition of the defendant upon any ground constituting a defense, including jurisdictional grounds, and may plead a cross action for a divorce and for such relief thereon as the facts pleaded and proven may warrant.

The two questions above propounded are answered in the affirmative.

Let judgment and decree be entered in favor of the plaintiff on her "cross complaint" (cross petition) to the "cross complaint" (cross petition) of the defendant, granting her an absolute divorce from the defendant, and for costs and for alimony in the sum of \$400, including attorney's fees.

GOVERNMENT *versus* LIVENGOOD.

(District Court, Canal Zone, Cristobal Division, May 6, 1926.)

Criminal No. 1524.

1. ACTIONS. PARTIES.

In all prosecutions for crimes named in the Penal Code of the Canal Zone, and amendments thereto (not including prosecutions under the National Prohibition Act, Narcotic Act, White Slave Act, Crimes committed on the high seas, etc.). "The Government of the Canal Zone" is the proper party plaintiff under the provisions of sec. 5 of the Code of Criminal Procedure. (L. C. Z., 174). This section was expressly confirmed by sec. 2 of the Panama Canal Act and has the force of an express Congressional enactment.

2. STATUTES. REPEAL BY IMPLICATION.

Repeal of statutes by implication is not favored. Said section 5 of the Code of Criminal Procedure has not been repealed by the enactment of the Panama Canal Act and amendments thereto, nor by such changes as were made in the judicial department in this jurisdiction by such acts. (Government *vs.* Williams, 3. C. Z. R., 297, overruled.

For plaintiff, *F. Edward Mitchell*, District Attorney, and *J. J. McGuigan*, Assistant District Attorney.

Attorney for defendant, *E. M. Robinson*.

MARTIN, District Judge. The information in this case charges the defendant with the crime of embezzlement under the provisions of chapter 6, title 16 of Act No. 14, adopted by the Isthmian Canal Commission, September 3, 1904. Such Act No. 14 is the Penal Code of the Canal Zone. The information is entitled, "The Government of the Canal Zone *vs.* J. Frank Livengood." It recites, in the closing part thereof, that the crime therein charged was committed "against the peace and dignity of the Canal Zone."

The defendant demurs to the information upon the ground that, since the enactment of the Panama Canal Act the District Court of the Canal Zone has jurisdiction to try such criminal cases only as are brought in the name of the United States of America, and that there is no "Government of the Canal Zone" and consequently no crime can be committed against the peace and dignity thereof.

The consideration of the issue thus raised requires a brief recital of the form of government relating to the judiciary of the Canal Zone and the statutes enacted for the government of the Zone prior to and after the time when the Panama Canal Act was put in force.

By treaty between the United States and the Republic of Panama, the former acquired the Canal Zone and exclusive sovereignty thereover. (Treaty, Art. 2 and 3. Treaties and Acts, 18-19. Wilson *vs.* Shaw, 204 U. S., 24). The Act of Congress, approved June 28, 1902 (32 St., 481; Treaties and Acts, 30), authorized the President to acquire

a zone of land across the Isthmus of Panama for the construction of a transisthmian canal, and to construct such canal through the agency of the Isthmian Canal Commission, which was created by such act. By Act of Congress, approved April 28, 1904 (33 St., 429; Treaties and Acts, 34), the President was authorized until the end of the 58th Congress, unless provision therefor was sooner made by Congress, to make all rules and regulations necessary for the government of the Canal Zone, and to exercise all military, civil, and judicial powers necessary therefor in such manner as the President shall direct.

Pursuant to these Acts of Congress, by Executive Order, May 9, 1904 (E. O., 20), the President authorized and directed the Isthmian Canal Commission "to make all needful rules and regulations for the government of the Zone and for the correct administration of the military, civil, and judicial affairs and its possessions." (E. O., 22).

By virtue of the authority thus conferred, the Isthmian Canal Commission, on September 3, 1904, adopted Act No. 14 (Penal Code), for the Canal Zone. On the same date the Code of Criminal Procedure (Act No. 15), was established by such Commission. The Penal Code is found in the Laws of the Canal Zone, pages 93 to 172, inclusive; the Code of Criminal Procedure is found in the Laws of the Canal Zone, pages 173 to 243, inclusive. The Penal Code, among other things, defines the crime of embezzlement, and provides for the punishment thereof. Section 5 of the Code of Criminal Procedure (L. C. Z., 174), provides: "A criminal action is prosecuted in the name of the Government of the Canal Zone as a party against the person charged with the offense."

The Isthmian Canal Commission, on August 16, 1904, adopted Act No. 1, providing for the organization of the judicial department and the exercise of judicial powers "in the Canal Zone." This act created a supreme court, circuit courts, and municipal courts. (L. C. Z., 9.) By Executive Order of March 13, 1907 (E. O., 60-61), the municipal courts were abolished and district courts were created in lieu thereof. The powers and jurisdiction of these several courts, as well as the procedure therein, were defined by laws enacted by the Isthmian Canal Commission. The judicial organization thus created continued to function until the year 1914.

August 24, 1912, Congress enacted the Panama Canal Act. (37 St., 560; Treaties and Acts, 79). This act in section 1, designates the zone of land granted to the United States by the Republic of Panama as the "Canal Zone," and the Canal, then nearing completion, as the "Panama Canal." Section 4 of the act provides that when, in the judgment of the President, the construction of the Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary "the President is

authorized to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist and the President is authorized to complete, govern, and operate the Panama Canal and govern the 'Canal Zone' or cause this to be done." The Isthmian Canal Commission organization was terminated by Executive Order of January 27, 1914 (E. O., 155).

Section 7 of the Panama Canal Act as amended by Act of Congress, approved September 21, 1922, provides that: "In connection with the civil government of the Canal Zone which is to be held, treated, and governed as an adjunct of such Panama Canal, the Governor shall have official control and jurisdiction over the Canal Zone." The President is authorized to subdivide the Zone into "towns" and the Governor is authorized to appoint a magistrate and a constable for each town. The jurisdiction and powers of magistrates' courts are therein defined, and a method prescribed for the adoption of rules of procedure therein, and various other matters are therein provided for.

Section 8 of the act as amended by the Act of Congress, approved September 21, 1922, creates the District Court for the Canal Zone, defines its jurisdiction and powers, provides for the appointment of the judge thereof by the President, by and with the advice and consent of the Senate, fixes the salary and per diem of such judge, provides for the adoption of rules of practice and procedure by order of the President, and contains other provisions. Under these two acts the present judicial system of the Canal Zone is now organized and is functioning.

Section 2 of the Panama Canal Act provides that the courts created under the old organization "shall continue in operation until the courts provided for in this act shall be established." Section 9 of the act as amended by Act of Congress of September 21, 1922 (Treaties and Acts, 84, 282), provides for the transfer from the circuit and district courts of the old organization "of all causes, proceedings, and criminal prosecutions pending therein" to the courts created by said act having jurisdiction of like cases, whereupon such circuit and district courts "shall cease to exist." The Supreme Court by the provisions of the section, is continued only until cases then pending therein are decided.

Upon this situation it is contended that the Panama Canal Act, and the amendment thereto of 1922, by implication repealed section 5 of the Code of Criminal Procedure; that the changes in the courts of the Canal Zone and the practice and procedure therein effected by the enactment of the Panama Canal Act, and especially that provision of the Act which provides that the Canal Zone is to be held, treated, and governed as an adjunct of the Panama Canal, creates a new and distinct organization of the judicial department of the Canal

Zone wherein the "Panama Canal" takes the place of the "Government of the Canal Zone;" and that therefore the United States being the sovereign power in the Canal Zone, criminal prosecutions should be in the name of the United States of America.

It is conceded by counsel for the defendant that the Panama Canal Act does not expressly repeal the provisions of section 5 of the Code of Criminal Procedure. There is no repealing clause in such act. The amendment of 1922 repeals all laws in conflict with such amendment but mentions no specific statute which is repealed thereby. The repeal of a statute by implication is not favored by the courts. The presumption is against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable or the intent to effect a repeal must be otherwise clearly expressed. In a case of plain, inevitable, and irreconcilable repugnancy the old law will be repealed by implication to the extent of the repugnancy, but if both can by any reasonable construction be construed together both will be sustained. (36 Cyc., 1071-1076.)

Let us scrutinize the defendant's contention. He claims that in some occult manner the entire judicial system of the Canal Zone has been changed by the putting in force of the Panama Canal Act; that the present government is that of The Panama Canal, where before it was that of the Canal Zone. It must be admitted that the Canal Zone in its territorial extent is now substantially the same, and is devoted to the same purposes, as it was prior to 1914. It is still officially designated by the Panama Canal Act as the "Canal Zone." There has been no change whatever in the sovereignty thereover, or in the powers which the sovereign may exercise. One form of organization was created by the sovereign and adapted to the period of construction. When the Canal was completed that organization was abolished and another substituted, adapted to the purposes of maintenance and operation. The purposes of both organizations were identical—the construction, and the maintenance, operation, and protection of the Canal and the government and sanitation of the Canal Zone. In the judicial department there has been no substantial change except in the names of the courts, in the abolishment of the Supreme Court, and providing for the right of appeal to the Circuit Court of Appeals for the Fifth Circuit at New Orleans. With slight changes the laws of the Canal Zone, civil and criminal, substantive and procedural, are the same. With some slight variations the jurisdiction of the magistrates' courts correspond to that of the old district court. With some variations and some additions since the enactment of the Panama Canal Act the jurisdiction of the District Court is that which was exercised by the old Circuit Courts. The substantial

change effected in the judicial department by the Panama Canal Act, therefore, is the change in the names of the courts exercising a given jurisdiction and given functions, in the manner of appointing the judge of the District Court, and in providing for appeals from the District Court to the Circuit Court of Appeals at New Orleans. Do these changes indicate a clear intention on the part of Congress to repeal by implication the provisions of section 5 of the Code of Criminal Procedure? Are such changes so inconsistent with the former method of procedure in criminal actions that the court must hold that section 5, aforesaid, has been repealed by implication? Do they clearly indicate the intention of Congress that criminal actions shall be prosecuted in the name of the United States where no express provision is found therefor, instead of the name designated in section 5 of the Code of Criminal Procedure? May the sovereign power exercising control and jurisdiction over the Canal Zone prescribe the name of the plaintiff in actions prosecuted for violation of the laws of the Canal Zone other than in the name of the sovereign?

The last question will be considered first, for it lies at the very foundation of the validity of said section 5. Sovereignty is defined as the aggregate of all civil and political power; the supreme, absolute, uncontrollable power by which any state is governed. (36 Cyc., 516.) It is conceded that the Canal Zone having been acquired by the United States under that provision of the United States Constitution providing for the acquisition and government of territory so acquired, is the sovereign in the Canal Zone. It is undisputed that Congress is the sole primary power for the enactment of legislation for the Government of the Canal Zone. It is difficult to perceive why the sovereign may not designate the name of the party plaintiff which shall be used in all or any criminal prosecutions for the violation of the penal laws in force in the Canal Zone. The rule is laid down in 12 C. J., 826, that the legislature (Congress is the legislature for the Canal Zone), has power to regulate and control the forms of procedure for the administration of justice in the courts. As bearing upon this question, see "*Fong Yue Zing vs. U. S.*, 149 U. S., 714-15. There are many instances, in both state and national legislation, where parties other than the state or the nation may be authorized to sue in behalf of the state or nation, and where suits may be brought against the state or nation by maintaining the same against an officer thereof who represents the state or the nation. If this may be done, no good reason is perceived why the sovereign power in the Canal Zone may not, by statute, designate the name of the plaintiff in criminal actions prosecuted in the courts of the Canal Zone. This it has done in section 5 of the Code of Criminal Procedure. The Court is of the opinion that such changes as were made in the judicial department of the Canal Zone

by the Panama Canal Act and the amendment thereto of 1922, did not repeal by implication the provisions of section 5 of the Code of Criminal Procedure, and that it was not the intention of Congress by the enactment of said two acts to effect such repeal.

The other side of the question will now be examined. Are there any provisions in the Panama Canal Act and the amendment of 1922 which militate against such repeal by implication? Section 2 of the Panama Canal Act provides:

That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone, by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide.

By this enactment the penal laws of the Canal Zone and the Code of Criminal Procedure, including section 5 thereof, were made an integral part of the Panama Canal Act.

Jackson vs. Smith, 241 Fed., 747, affirmed 246 U. S., 288.

McConaughey vs. Morrow, 263 U. S., 39.

Said section 5 of the Code of Criminal Procedure therefore became, by virtue of the Panama Canal Act, a law of the Canal Zone, with the force and effect of express congressional enactment. Has Congress provided otherwise? In whose name shall criminal actions be prosecuted for violations of the laws of the Canal Zone since the enactment of the Panama Canal Act? So far as the court has been able to find, Congress nowhere has expressly changed the provisions of said section 5. It has, by section 8 of the Panama Canal Act, and the amendment of 1922, delegated to the President the power to prescribe, amend, or repeal the rules of practice and procedure of the District Court of the Canal Zone and the rules of practice and procedure in the magistrates' courts. Whether that power warrants the President in amending or repealing said section 5 of the Code of Criminal Procedure need not now be determined. It is sufficient that the President has neither amended nor repealed that section and it still has the force and effect of an express congressional enactment. Congress, however, as if it anticipated precisely such a question as is here raised, further provided in section 9 and the amendment thereof of 1922, that "all existing laws in the Canal Zone governing practice and procedure in existing courts shall be applied and adapted to the practice and procedure in the new courts." In order to adapt rules governing practice and procedure in criminal actions in the magistrates' courts, it is necessary only to change the name of the court from "district court" to "magistrates court," and to adapt the rules of practice and procedure in the district court, to change the name of the court from "circuit court" to "district court." A change of the name of the party plaintiff in a criminal action is not required to effect the adaption of the procedure under said section 5. The above-quoted

provision is definite and certain in its terms. It leaves no doubt of the intent of Congress in its enactment. It forecloses argument. It furnishes an absolute bar to the doctrine of implied repeal urged by the defendant. Coupled with the provisions of section 2 of the Panama Canal Act last above quoted, it requires that section 5 of the Code of Criminal Procedure shall be here applied and the decision of the question raised by the demurrer ruled accordingly.

It is urged, however, that Judge Hanan, of this court, decided in 1921, in the case of the United States *vs.* Williams (3 C. Z. R., 297), where it was urged by demurrer that the prosecution could not be maintained in the name of the United States, that criminal actions in the Canal Zone shall be prosecuted in the name of the sovereign, the United States of America. It is likewise true that his successor, Judge Kerr, held that such prosecutions should be in the name of the "Government of the Canal Zone" under the provisions of said section 5, and that Judge Wallingford, successor to Judge Kerr, adopted the same rule.

The writer of this opinion feels, after a careful reading of the opinion of Judge Hanan in the Williams case, and after a careful consideration of the law, that the decision in the Williams case is based on a misconception and misconstruction of the law; that it did not take into consideration the fact that the sovereign may direct in what name and under what forms criminal actions may be prosecuted in the courts of its creation. The decision of Judge Hanan in the United States *vs.* Williams is therefore expressly overruled.

The Court reaches the inevitable conclusion that this action is prosecuted in the name of the proper party plaintiff, and that the demurrer should accordingly be overruled. Let such an order be therefore entered.

IN RE ESTATE OF MALONE.

(District Court, Canal Zone, Balboa Division, May 26, 1925.)

Probate No. 2795.

1. ESTATES. SUCCESSION.

Where the deceased left no legal ascendants or descendants, but it appears that in addition to the deceased there was born to his parents one brother, the claimant of the estate herein, and two sisters, Margaret and Suzanna, and where it appears that Margaret died prior to the death of Arnold Malone without having married and without issue, and where it appears that when last heard from, Suzanna Malone, the other sister, was alive, single, and without issue—that the claimant, the brother of the deceased, is entitled to half the estate, and that Suzanna Malone is entitled to the other half in the absence of satisfactory proof that she is dead without leaving other heirs than petitioner who is the brother of the deceased.

2. STATUTES. STATUTORY CONSTRUCTION. DEFINITION OF "BROTHERS."

Article 1047 of the Civil Code uses the term "brothers" as successors under certain circumstances. Held, under Art. 33, Art. 44, Art. 1041, Art. 1042, Art. 1045, and Art. 87 of Law 153 of 1887 of the Civil Code, that the term "brothers" as used in Art. 1047 of the Civil Code should be construed to mean "brothers and sisters."

Attorney for petitioner, *A. B. Thompson.*

MARTIN, District Judge. Arnold Malone died intestate October 11, 1924, leaving an estate, consisting of personal property only, situated in the Canal Zone. His estate has been duly and regularly administered. The final account of the administrator has been filed. April 14, 1925, Theophilus Harris, claiming his true name to be Horace Alston Malone, filed a petition claiming to be the brother and sole heir of the deceased and praying distribution of the estate to him.

It appears that Arnold Malone, Horace Alston Malone (the claimant), Margaret Malone, and Suzanna Malone, were the four legitimate children of Stephen Malone and Ann Elizabeth Malone, his wife; that the claimant, although known on the Canal Zone as Theophilus Harris, is in fact Horace Alston Malone, the brother of the deceased; that the father and mother of said children died intestate prior to 1903; that Margaret Malone died intestate, unmarried, and without issue, in the year 1908; that Suzanna Malone was then in the Island of Antigua, West Indies, but that shortly thereafter she went to the Island of Grenada in the West Indies; that the claimant heard from her a few times thereafter but has heard nothing from her directly or indirectly for more than 10 years, except that it has been rumored to him that she is dead; that at the time she went to Grenada, Suzanna was unmarried and without issue.

Upon this state of facts the claimant contends that he is entitled to the whole of said estate under the provisions of Art. 1047 of the Civil Code. The administrator disputes this contention. So far as material to this question, Art. 1047 is as follows:

If the deceased shall not have left legitimate descendants or ascendants, he shall be succeeded by his legitimate *brothers*, his spouse and his natural children: * * * Should there be no spouse, or no natural children, the legitimate *brothers* shall succeed to one-half the property, and the natural children or the spouse to the other half. Should there be no natural children and no surviving spouse, the *brothers* shall receive the entire inheritance.

Throughout this entire article in the Spanish Code the term used is "*hermanos*" which, literally translated, means "*brothers*;" and it is quite evident that the translator of the Civil Code in Art. 1047 made a literal translation. Is such translation the correct one? Upon the answer to that question rests the decision of this controversy.

To arrive at a correct answer it is necessary to construe with Art. 1047 as translated and as it appears in the Spanish from which the translation was made, with various other provisions of the Civil Code.

Art. 33, of the Civil Code, provides that:

* * * the words man, person, child, adult, and other similar words which in their general sense are applied to individuals of the human species, without distinction of sex, shall be understood to include both sexes in the provisions of the laws, unless from the nature of the provision or the context they are obviously limited to one only.

But, on the other hand, the words woman, girl, widow, and other similar words designating the feminine sex shall not be applied to another sex unless the law expressly extends them to the same.

Art. 61, of the Civil Code, declares that in cases where the relatives may be heard, the following persons must be heard in the order given: 1. Legitimate descendants. 2. Legitimate ascendants.

* * * 5. The collateral legitimate *relatives* to the sixth degree.

Art. 85, of Law 153 of 1887 (Civil Code, p. 566), which is substituted for Art. 1040 in the chapter relating to intestate succession, provides that the following are called to the intestate succession: The legitimate descendants; the legitimate ascendants; the legitimate collaterals; the natural children; the natural parents; the natural brothers and sisters; and the surviving spouse of the deceased and the municipality of his residence.

Article 87, of Law 153 of 1887 (Civil Code, p. 566), declares that:

In the absence of legitimate descendants, ascendants, and brothers and sisters, of a surviving spouse and of natural children, the other legitimate collaterals of the deceased shall succeed him * * * .

Article 44, of the Civil Code, defines the term "collateral." It provides:

A collateral, transverse, or oblique line is that formed by persons who, although not proceeding from each other, do descend from a common stock, for example: Brother and sister, children of the same father or mother, etc.

Article 1041 declares:

An intestate succession is either by personal right or by right of representation. Representation is a fiction of the law by which it is supposed that a person has the place and consequently bears the degree of relationship and has the hereditary rights that his father or mother would have if either should not wish or not be able to succeed.

Article 1042 declares:

Those who succeed by representation inherit in all cases *per stirpes*, that is to say, that whatever be the number of children who represent the father or the mother they receive in equal shares the portion that would have fallen to the father or mother represented.

Article 1045 provides:

The legitimate children exclude all the other heirs excepting the natural children, when the deceased shall have left both the legitimate and natural children, etc.

It must be apparent from the foregoing quotations from the Civil Code, that the law of intestate succession as therein contained includes both brothers and sisters without distinction between them either as to the right to inherit or the share of the inheritance. It seems perfectly clear to the court that the word "brothers" (hermanos) used in Art. 1047 (and in Art. 1048), is one of the class of names designated in Art. 33 which is used "without distinction as to sex" and "shall be understood to include both sexes in the provisions of the laws, unless from the nature of the provisions or the context they are obviously limited to one only."

The other articles of the Civil Code hereinbefore quoted, and others which might be quoted and which have a bearing upon the subject, plainly indicate that both brothers and sisters are entitled to inherit by right of representation of the father and the mother. If Art. 1047 be given the construction contended for by the claimant, then Art. 85, of Law 153 of 1887, declaring that the legitimate collaterals of the deceased are called to the intestate succession, must be amended by judicial construction to read "the legitimate male collaterals of the deceased." The words "his legitimate collaterals," as used in Art. 85 above, can mean only one thing, and that is, the collaterals of both sexes. Again, in said Art. 85, "the natural brothers and sisters of the deceased are called to the intestate succession." Why permit the natural sisters to succeed and bar the legitimate sisters?

Article 1042 provides that those who succeed by representation inherit according to the number of children who represent the father or the mother. The term "children" as here used means the children of both sexes, of course, for it is so declared by Art. 33. If a literal construction of Art. 1047 be adopted as it is found in the Civil Code of the Canal Zone, then there must be read into section 1042 the provision that the term "children" means male children.

There can be only one answer to the question propounded: The translation of the Spanish term "hermanos" in Art. 1047 to the word "brothers" is a *literal translation* and *not a correct one*. It should have been translated "brothers and sisters." If so translated and if so understood and construed, it brings Art. 1047 as translated into harmony with the remainder of the Civil Code relating to intestate succession. In no other way can the provisions of the Code relating to such intestate succession be harmonized; and the Court holds that the translation of Art. 1047, as it appears on page 227 of the Civil Code, in the use of the word "brothers" is an incorrect translation, and that the word "brothers" where it appears in said article must be construed to mean "brothers and sisters."

The Court holds that on the death of Arnold Malone, Horace Alston Malone, the brother, succeeded to a one-third interest in the estate of the deceased, and by right of representation of his sister, Margaret, who died in 1908, he acquired one-half of her third interest, and he thus became vested with a right to one-half of the estate of the deceased. If his sister, Suzanna, be still living, she inherited the other half of the estate.

This brings us to a consideration of the remaining contentions of the claimant. He claims that because Suzanna has not been heard from for more than 10 years she is presumed to be dead, under the provisions of subsection 24, section 350, of the Code of Civil Procedure, which declares that it is presumed "that a person not heard from in 7 years is dead." The difficulty with his contention in this respect is that there is no proof during the past 10 years as to whether his sister, Suzanna, married or whether at the time of her death—if she is dead—she left either a spouse or children, legitimate or natural. If Suzanna, in fact, died before the death of her brother, Arnold, and if she left no spouse and no issue, then the contention of the claimant is good and he is entitled to the whole estate, and by an appropriate order to be entered in this case claimant will be given additional time to furnish proof upon this question. If, however, she is dead and she left either a spouse or children, legitimate or natural, then the only effect of this presumption would be to give a right of administration upon her estate so that her property may be distributed to the persons entitled thereto by right of succession.

Under section 788, of the Code of Civil Procedure, if 2 years had elapsed after the death of Arnold Malone, and if it appeared that Suzanna Malone had been absent and unheard of for 10 years, and if it appeared that the claimant was an heir of such Suzanna, then the court might order distribution of her share of this estate to the claimant; but 2 years have not elapsed since Arnold Malone's death, nor was it shown that the claimant is an heir of Suzanna, for it is not shown that she is dead, or if dead, did not have a spouse or children surviving her, and the Court is therefore unable to grant the claimant any relief under this section.

In accordance with the foregoing opinion, it will be ordered in this case that the administrator pay to the claimant, Horace Alston Malone, one-half of the estate in the administrator's hands, and that such claimant be given until August 1, 1925, in which to furnish proof that he is the heir and entitled to the distributive share of said estate of his sister, Suzanna Malone.

TOWNSLEY *versus* HAMLIN.

(District Court, Canal Zone, Balboa Division, June 15, 1925.)

Civil No. 681.

1. DISTRICT JUDGE. DISQUALIFICATION. WHAT CONSTITUTES.

The plaintiff herein filed a motion for the withdrawal of the district judge from the trial of this action on two grounds: (a) Because of alleged intimate friendship and social, personal, and official relations between the defendant and the district judge; (b) Because of the rulings and decisions of the district judge before made in this action. Affidavits were filed by the defendant, and the district judge on his own behalf filed an affidavit, and it is held:

1. That the following grounds, found in sec. 8, C. C. P., are the only grounds for the disqualification of a district judge and his withdrawal from the trial of a case:
 1. Pecuniary interest in the result of the suit;
 2. Relationship to either party within the sixth degree of consanguinity or affinity;
 3. Having been counsel in the case or in a matter out of which the litigation arises;
 4. Having presided in an inferior judicature when his ruling or decision is the subject of review.

2. DISTRICT JUDGE. DISQUALIFICATION. HOW SHOWN.

Under the provisions of said sec. 8, C. C. P., a party may not peremptorily challenge the district judge and thereby force his withdrawal. It is left to the district judge to determine whether he is or is not disqualified. Such determination involves a hearing and a consideration of all the pertinent facts submitted. On such hearing the records and files, pleadings, motions, and orders made in the case so far as pertinent, the showing made by the party challenging the judge for disqualification, the showing made by the adverse party, and any affidavit of the judge himself, if made, may be considered.

3. DISTRICT JUDGE. DISQUALIFICATION. BIAS OR PREJUDICE.

Under the laws of the Canal Zone, the bias or prejudice of the district judge against a party, or in favor of a party, is not made a ground of disqualification.

4. DISTRICT JUDGE. DISQUALIFICATION.

Upon the facts shown by the record in this proceeding, held that the district judge was not disqualified upon any ground from hearing and determining such cause.

Attorney for plaintiff, *Felix E. Porter*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. June 12, 1925, the plaintiff herein filed a motion and affidavit for the withdrawal of the district judge from further acting in this case and the designation of another judge to sit herein. The motion and affidavit suggest two grounds, namely:

1. That the district judge has repeatedly rendered services to the defendant in this action as defendant's counsel. This allegation is made on information and belief.

2. That the district judge is biased and prejudiced against the plaintiff personally and in favor of the defendant personally: (a) Because of alleged intimate friendship and social, personal, and official relations between the defendant and the district judge; and (b) Because of the rulings and decisions of the district judge before made in this action.

The judge, in his own behalf, has filed herein an affidavit for the purpose of making of record in connection with the plaintiff's motion certain matters within the knowledge of the judge which do not appear of record in this action; and the defendant and his counsel have filed affidavits with respect to certain matters contained in said motion. All of these matters shown by the motion and affidavit of the plaintiff, the affidavits of the defendant and his counsel, the independent affidavit of the judge, as well as the pleadings, motions, and records and files in this action will be considered in the determination of the plaintiff's motion.

1. The applicable law respecting the disqualification of a judge in this jurisdiction is found in section 8 of the Code of Civil Procedure. It prescribes four grounds of disqualification, namely: (1) Pecuniary interest in the result of the suit; (2) Relationship to either party within the sixth degree of consanguinity or affinity; (3) Having been counsel in the case or in a matter out of which the litigation arises; and (4) Having presided in any inferior judicature when his ruling or decision is the subject of review. The section provides that no judge shall sit in any case or proceeding where any one of said four disqualifying facts exist, without the written consent of all parties in interest signed and entered upon the record. The remaining portion of the section provides how the disqualifying facts may be shown and how the matter is to be determined. It provides that:

No challenge as to the competency of any of the officials named in this section shall be received or allowed; but if it be claimed that the official is disqualified by the provisions of this section, the party objecting to his competency may, in writing, file with the official his objection, stating the grounds therefor, and the official shall thereupon proceed with the trial, or withdraw therefrom, in accordance with his determination of the question of his disqualification. His decision shall be forthwith made in writing and filed with the other papers in the case, but no appeal or stay of action shall be allowed from, or by reason of, his decision in favor of his own competency, until after final judgment in his court.

The first matter in the quoted portion of this section which invites attention is the first clause declaring that no challenge to the competency of the judge to sit in a particular case is to be received or allowed. Reading this in conjunction with that which follows, this means that a party to the case can not peremptorily challenge the judge and thereby force his withdrawal. This precludes the thought that such an issue is to be determined on *ex parte* proceedings. If

such party claims that the judge is disqualified, he may, in writing, file his objections stating the grounds therefor, and the judge so challenged, may "determine" whether he is or is not disqualified. If he decides that he is not disqualified, then his decision becomes a matter for review on appeal or writ of error. How is the judge to determine or decide such an issue? Determination or decision of a question, in law, usually means a hearing where all the pertinent facts may be submitted. It involves consideration of both sides of the controversy. What may the court here consider in determining the issue presented? Clearly, the records and files and pleadings and motions in the case, the showing made by the plaintiff, that made by the defendant and the independent affidavit of the judge, so far as they be pertinent. Such procedure will tend to the due administration of justice. To determine such a matter solely on the showing of the challenging party, will open the door wide to the withdrawal of the judge in every case where a party fancies that the judge is disqualified and files an affidavit sufficient in form and substance to effect that purpose, whether the judge be in fact disqualified or not. It is just as much the duty of a judge to sit in all cases and proceedings in his court where disqualification does not exist, even in the face of a challenge, as it is his clear duty to step aside and refuse to sit in any case or proceeding where his disqualification does exist, whether challenged or not.

Our statute is wholly unlike those of some of the state jurisdictions in Continental United States. For instance, in the State of Montana, where an affidavit of disqualification of the judge is filed, the judge has no power to determine the question, but must, as a matter of course, call in another judge to sit in the case. The filing of the affidavit of disqualification, whether true or not, divests the judge so challenged of all power to proceed further in the case. (*State vs. Clancy*, 77 Pac., 312-313, where the statute of Montana is quoted.) Our statute is wholly unlike section 21 of the Judicial Code of the United States which, in substance and effect, is like the statute of Montana. Under said section, where an affidavit of disqualification is filed, the judge challenged may determine only whether the affidavit is filed in time and whether in form and substance it complies with the section. If so, without consideration of other matter, he must make the certificate of disqualification required by the Judicial Code and withdraw from the case. (*Berger vs. U. S.*, 255 U. S., 22.) Apparently, the plaintiff's motion and affidavit are filed upon the theory that section 21 of the Judicial Code of the United States is applicable here; but such is not the fact. It is applicable only to the federal courts in Continental United States as is apparent from an examination of such Judicial Code, and such provision has never been made applicable to the Canal Zone.

What, then, are the facts with respect to the rendition of services to the defendant herein by the judge of this court? The plaintiff affirms the fact upon information and belief. The fact is denied by defendant and his counsel, and the judge knows that such fact so affirmed by the plaintiff is untrue. This ground of the motion must, therefore, be overruled.

2. It will be noted from the provisions of section 8 of the Code of Civil Procedure, that bias or prejudice of the judge against one party or in favor of the other party to a suit, is not made a ground of disqualification, nor has any other statute of this jurisdiction been found which so declares. The Court might, therefore, overrule the remaining grounds of the plaintiff's motion upon the legal ground above noted. The Court however, prefers to base the determination of the question raised by the plaintiff's motion upon other grounds; recognizing that it is fundamental in the American system of judicature, that the rights of litigants shall be determined by an unprejudiced jury or judge.

It is contended by the plaintiff that because of the friendship and social, personal, and official relations alleged to exist between the defendant and the judge of this court, such judge is disqualified and can not give the plaintiff a fair and impartial hearing in this action. The question of the official relationship between the defendant and the judge can not be considered because they are established by law. The deputy marshal is the executive arm of the court. And such official relationship of itself can not be made a ground of challenge to the judge. It is only in the event that it be shown that as a result of such official association, such relations of personal friendship have been created, which, of themselves, will preclude the judge from giving the adverse party a fair hearing, that the challenge should be allowed.

A judge is not, by virtue of his office, precluded from making and having friends and meeting them in friendly personal and social relations. Such facts, of themselves, do not disqualify the judge. In order to disqualify, it must appear that such relations so affect the judge that he can not fairly and impartially administer justice between his friend and an adverse litigant. Where such relations exist, it may be embarrassing for the judge to sit in the trial of the case, but the observance of his oath of office makes it his duty nevertheless, to do that precise thing and to determine the case fairly and impartially regardless of friendship or social relations. If such circumstances render it probable that the judge can not fulfill the duties of his office in the particular case, then it is his bounden duty, upon his own motion or challenge for bias, to withdraw from the case and allow another to sit in the trial thereof. The writer of this decision is not conscious of any bias or prejudice whatsoever against the plaintiff or in favor of the

defendant, arising out of friendships, social or personal relations, or any other matter of any kind which will cause the judge of this court to deny to the plaintiff any right or privilege to which he is justly entitled or to grant to the defendant any right or privilege to which he is not entitled under the law and the facts as they may be exhibited; nor does the record in this matter or in this action sustain the plaintiff's contention.

With respect to previous rulings and decisions made in this action, these may not, ordinarily be made the basis of a challenge to the judge for bias or prejudice. (U. S. *vs.* Fricke, 261 Fed., 541. *Berger vs.* U. S., 255 U. S., 22 at 31.) It is no doubt true that if such rulings were arbitrary, unjust, unfair, or discriminatory, they should be considered as showing or tending to show bias or prejudice. But the Court is of the opinion that the rulings before made in this action do not fall within any classification from which bias or prejudice will be presumed or found. If the Court has committed error therein, such errors may be rectified on appeal or writ of error. If errors have been made, they have been the result of an error of judgment, and not of bias or prejudice in the case.

It is therefore determined and decided that the plaintiff's motion be and the same is hereby overruled as to each and every ground thereof; to which the plaintiff excepts and his exception is allowed.

TOWNSLEY *versus* HAMLIN.

(District Court, Canal Zone, Balboa Division, June 22, 1925.)

Civil No. 681.

1. LIBEL AND SLANDER. DAMAGES RECOVERABLE.

Under the law of the Canal Zone the word "indemnity" used in Art. 2341 of the Civil Code, means reimbursement, recompense for loss or injury. It warrants only the recovery of compensatory damages. It excludes recovery of exemplary or punitive damages.

2. LIBEL AND SLANDER. STATUTORY CONSTRUCTION. DEFINITION OF "OFFENSES AND FAULTS."

The term "offense" as used in Civil Code, Art. 2341, means a transgression of the law; a punishable violation of law; a crime.

The term "fault" means an error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance resulting from intention, incapacity, or perversity; a wrong tendency, course, or act; a breach of legal duty or a wrongful act for which recovery may be had.

3. STATUTES. STATUTORY CONSTRUCTION. COMMON LAW IN AID OF.

If there is any doubt or uncertainty as to the construction and interpretation of the laws of the Canal Zone, the courts should adopt that construction which more clearly harmonizes with the recognized principles of jurisprudence prevailing in the United States, and may construe statutes by analogy to the principles of the common law.

4. LIBEL AND SLANDER. WHAT IS SLANDER.

1. According to the principles of the common law, an action for slander lies only where it is shown:
 1. That the words falsely used impute a crime involving moral turpitude, for which the party, if the charge is true, may be indicted and punished;
 2. That the words falsely used impute that the person is infected with some loathsome disease where, if the charge is true, it would exclude the party from society;
 3. Defamatory words falsely spoken of a person which impute to him unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties thereof.
 4. Defamatory words falsely spoken of a party which prejudices such party in his profession or trade.
 5. Defamatory words falsely spoken of a party which, though not in themselves actionable, occasion the party special damage.
2. The evidence in this case shows that the defendant called the plaintiff a crook. The word "crook" does not impute a crime, and upon that ground it is not actionable *per se*. The evidence failed to show that the word was spoken by and concerning the plaintiff either with respect to an office or employment of profit, or with respect to his profession or trade, and there were no special damages pleaded or proven. It did appear that the word used was spoken of and concerning the plaintiff with respect to his conduct as a delegate at the Democratic National Convention in 1924; held, that the words were not slanderous *per se*, and no special damages being proven, that the plaintiff was not entitled to recover.

5. LIBEL AND SLANDER. PLEADING. INDUCEMENT.

Where words are not slanderous *per se*, the inducement is the statement of facts out of which the charge arises, or which are necessary or useful to make the charge intelligible. Its office is to narrate the extrinsic circumstances which, coupled with the language used, affect its construction and render it actionable where, standing alone and not thus explained, the language would appear not to concern the plaintiff, or, if concerning him, not to affect him injuriously.

6. LIBEL AND SLANDER. PLEADING. COLLOQUIM.

The "colloquim" is a direct allegation that the words used concerned the plaintiff and his affairs, or concerned the plaintiff and the facts alleged in the inducement.

7. LIBEL AND SLANDER. PLEADING. INNUENDO.

If the words used are equivocal or ambiguous and admit of several meanings, it is the office of the innuendo to define the meaning which plaintiff thinks they ought to bear. The innuendo can not enlarge or restrict the natural meaning of the words, nor introduce new matter. The want of proper allegations in an inducement and colloquim can not be supplied by innuendo. If the publication is not actional *per se* it can not be made so by an innuendo.

Attorney for plaintiff, *Felix E. Porter*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. This is an action for slander. The substantial allegations of the complaint are:

1. That on the 10th day of November, 1914, plaintiff was an employee of The Panama Canal, and the representative of his coworkers

in the Metal Trades Council, and had the confidence of his employer and his fellow workers, and that he bore a good name in his community.

2. That on said date the defendant spoke and published of and concerning the plaintiff to Joseph Wynne, Secretary of the Metal Trades Council, and in the hearing of others, the words, "Lou Townsley is a crook."

3. That said words were false and malicious.

4. That defendant meant by said words, and intended his hearers to understand, and they did understand, that the plaintiff was dishonest, dishonorable, and disreputable, and unfit for employment by The Panama Canal and for association with the people of his community and to represent his fellow workers in the Metal Trades Council.

Plaintiff demands *general* damages in the sum of five thousand dollars (\$5,000).

Defendant demurred to the complaint on the ground that it failed to state a cause of action, but the demurrer was overruled. The defendant then answered, first, by way of a general denial; second, by a plea of justification; and, third, by a plea of privilege.

Upon these issues a jury was impaneled and the plaintiff submitted testimony in support of his complaint. At the conclusion thereof the defendant moved for dismissal of the action on the grounds:

1. That the complaint does not state a cause of action;

2. That the proof of the plaintiff shows that he is not entitled to recover; and

3. That no special damages are pleaded or proven.

Upon this motion arguments were heard, and the Court now renders the following opinion on such motion:

1. It was suggested to the Court that the overruling of defendant's demurrer precludes the court from now considering the sufficiency of the complaint. This suggestion is not tenable.

2. Before considering the legal questions involved, a brief statement of the proofs submitted by the plaintiff will be made. It appears from the testimony of the witness, Wynne, that some days before November 10, 1924, he had written a letter to the defendant, then secretary-treasurer of the Democratic Club of the Canal Zone, about receipts for money contributed by the members of the club. On November 10, 1924, defendant was in the office where Wynne was employed and they had a conversation about the subject matter of said letter. During the conversation the plaintiff's name was brought into it and the defendant then spoke the words charged in the plaintiff's complaint of and concerning the plaintiff. The witness, Moore, avers defendant spoke the words charged in the complaint, but he heard nothing else of the conversation. The action is based on the

words used at this time and place. After the speaking of the words the defendant explained to Wynne that they were used concerning the plaintiff with relation to his actions and conduct as a delegate in the Democratic National Convention in June-July, 1924. It appears that plaintiff and defendant were both elected delegates from the Canal Zone to such convention. Other witnesses testified that defendant made substantially the same charge to them at other times and places of and concerning plaintiff with relation to the conduct of the plaintiff at said convention. There was evidence of two witnesses that the plaintiff's reputation in his community was good prior to November 10, 1924. It was not shown that the plaintiff was employed by The Panama Canal, or that he was the representative of his fellow workers in the Metal Trades Council, or that the words spoken by the defendant related in any manner to the conduct of the plaintiff in his employment or office, but that the words were used with specific reference to the conduct of the plaintiff as a delegate to the said convention.

It is the contention of the plaintiff that the complaint states a cause of action, and that the proof offered is sufficient to sustain a recovery under the provisions of article 2341 of the Civil Code, in force in this jurisdiction. Said article 2341 is found in Title XXXIV, entitled "Common Liability for Offenses and Faults," and reads:

He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed.

Article 2342 reads:

This indemnity may be demanded not only by him who is the owner or possessor of the thing which has suffered the damage or by his heir, but also by the usufructuary, etc.

The word "indemnity" as here used means that which is awarded to a person to prevent his suffering damage; making reimbursement; making good; a recompense for loss or injury. (*Rogers vs. Shawnee Fire Insurance Company*, 111 S. W., 592, 593.) The distinction between "indemnity" and "penalty" is pointed out in the case of *Goeting vs. Normoyle*, 103 N. Y. Supp., 881. The Supreme Court of the Canal Zone, in the case of *Melendez vs. Union Oil Company*, 1 C. Z. Reports, 106, declares that exemplary damages are not recoverable in actions in this jurisdiction unless the Civil Code or the laws of the Canal Zone so provide, and then only to the extent so provided; and it declares further that "neither in the Panama Code (Civil Code) nor in amendments thereto, nor any laws which have been enacted for the Canal Zone since, is there any mention of the doctrine of exemplary or punitive damages," and that no such damages can be recovered.

The law in this jurisdiction with respect to such matters stands today as it stood at the time of that decision. It follows, therefore, that

the word "indemnity" as used in article 2342, applicable to recovery in a proper case under article 2341, does not involve any element of punishment. It provides a measure of recovery, compensatory, and not punitive.

Article 2341 declares that such indemnity may be recovered in two classes of cases. (1) For offenses, and (2) for faults. What then is the meaning of the word "offense" as here used? In its legal signification it means transgression of the law. (*Moore vs. Illinois*, 55 U. S., 13.) It means a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights. It means a punishable violation of law; a crime. (*Abbott's Law Dictionary*.) The terms "crime" and "criminal offense" are synonymous. (*State vs. West*, 43 N. W., 845.) It includes criminal contempts. (*Ex parte Grossman*, 267 U. S., 87.)

What is meant by the word "fault" as here used? The word is defined in *Bouvier's Law Dictionary*, vol. 2 (3d Ed.), 1911, as follows:

An error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act.

It seems clear that any wrongful act, for which indemnity may be awarded is within the meaning of the word "fault" as here used. When Congress, in 1912, ratified the Civil Code of the Canal Zone by virtue of the provisions of section 2 of the Panama Canal Act, and provided in such act for the future depopulation of the Canal Zone and the removal therefrom of the inhabitants, who were familiar with the Civil Law and for whose benefit it was adopted, it seems fair to assume that it intended the words "offense" and "fault" to have their usual, ordinary meaning, as construed by the courts of the Canal Zone and those of the United States. The courts of the United States have construed the word "offense" as meaning a crime, and the word "fault" as involving a breach of legal duty or a wrongful act for which recovery may be had. It is not a crime under the laws of the Canal Zone for one person to call another a "crook." So that this case does not fall within the designation of the word "offenses" as used in article 2341.

The question then naturally arises, "Is it embraced within the meaning of the word "fault" as used in such article, and by what principles shall the statute allowing indemnity for faults be construed?"

The Supreme Court of the Canal Zone, in *Kung Ching Chong vs. Wing Chong*, 2 C. Z. Reports, 25, 30, declared the rule that the courts of the Canal Zone were "in duty bound to follow the rules of statutory construction of the courts of common law, and ascertain by them the meaning and spirit of the Codes." In the later case of *Fitzpatrick vs. Panama Railroad* (*Id.*, 111, 121) the same court said:

If there is doubt or uncertainty as to the construction and interpretation of the laws here existing prior to February 26, 1904, the courts of the Canal Zone should accept and adopt that construction which more clearly harmonizes with the recognized principles of jurisprudence prevailing in the United States.

In the case of the Panama Railroad Company *vs.* Bosse, 249 U. S., 41, which was an action for personal injury resulting from negligence, the United States Supreme Court reviews the history of the Civil Code of the Canal Zone, the depopulation of the Zone and the removal therefrom of the inhabitants who had prior to that time occupied it and for whose benefit the Civil Code was adopted, and calls attention to the fact that the Zone is now populated by people unfamiliar with the Civil Law, but familiar with the common law. The Supreme Court in that case declares:

The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English courts.

And then, after reviewing the decisions of the courts of the Canal Zone, where it is held that such courts will look to the common law in the construction of the Civil Code, the Supreme Court of the United States proceeds:

We are satisfied that it would be a sacrifice of substance to form if we should reverse a decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the Civil Code had continued to regulate a native population and to be construed by native courts.

In the later case of Panama Railroad Company *vs.* Rock, which was an action by the husband for the death of his wife, due to negligence, the Supreme Court of the United States, in its majority opinion, declares:

Under all the circumstances, we conclude that the reach of the statute is to be determined by the application of common law principles. Panama Railroad Co. *vs.* Bosse, 249 U. S., 41, 45; and applying these principles, it is clear that the general language of Art. 2341 does not include the right of action here asserted. It would not be difficult to find generalizations of the common law quite as comprehensive in terms as the provision now under review—as, for example, “There is no wrong without a remedy;” but, nevertheless, under the principles of the common law, it has required specific statutes to fix civil liability for death by wrongful act; and it is this requirement, rather than the construction put upon the statute in civil law countries, that the inhabitants of the Canal Zone are presumed to be familiar with, and which affords the rule by which the meaning and scope of the statute in question are to be determined.

If our codes are to be construed by analogy to the principles of the common law; if such is the law with which the present inhabitants of the Zone are familiar and “which affords the rule by which the mean-

ing and scope of the statute in question are to be determined" in an action for personal injury, or in one for wrongful death, certainly the same rule must guide this court in holding that the plaintiff may not recover in this action unless by pleading and proof he brings himself within the rules analogous to the common law relating to slander.

It is seriously contended by the plaintiff, and he bases his right to recover, upon the contention that mere pleading and proof of the speaking of the words, and that they are false and malicious, gives him a right of action for damages under articles 2341 and 2342; and he cites the statute and decisions of Louisiana in support of his claim.

Article 2315 of the Civil Code of Louisiana provides:

Every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it.

This article is found in a chapter entitled "Of Offenses and Quasi-Offenses." The courts of Louisiana hold that the use of such language as is charged in this case is a *quasi* offense. (*Sportoni vs. Fourichon*, 4 So., 71.) The word "*quasi*" is a Latin word meaning "almost." (*People vs. Bradley*, 60 Ill., 390, 402.) The word "offense" as herein noted means a crime. So that a *quasi* offense is almost a crime. It is an offense not constituting a crime or misdemeanor at law, but it is in the nature of a crime. It includes a class of offenses against the public which have not been declared crimes, but wrongs against the local or general public properly to be repressed or punished by penalties and forfeitures. (*Pittsburgh, etc., Ry. Co. vs. Farrell*, 78 N. E., 988, 995, 80 N. E., 425; *Southern Ry. Co. vs. McNeeley*, 88 N. E., 710.) The language of the statute of Louisiana, as construed by the courts of that State, therefore, present a substantially different situation from that which arises in this case under the provisions of articles 2341 and 2342. Under the Louisiana laws an action for slander partakes of the nature of a criminal action, although not punishable as a crime. Under our statute the action partakes of the nature of a civil remedy for the recovery of indemnity, without any element of a *quasi* criminal nature whatsoever. The Court therefore holds that neither the Louisiana statute, nor the decisions of the Louisiana courts thereunder, have any persuasive or controlling effect in construing the articles of our Civil Code applicable to this case.

Tested by the principles of the common law, as declared by the courts of Continental United States where that law prevails, what are the rights of the plaintiff in this action under his pleading and proof? According to the principles of the common law an action for slander can be maintained and recovery had therefor only where it is shown.

1. That the words falsely used impute a crime involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.

2. That the words falsely spoken of a person impute that the party is infected with some loathsome disease where, if the charge is true, it would exclude the party from society.

3. Defamatory words falsely spoken of a person which impute to him unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such office or employment.

4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade.

5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage.

Pollard *vs.* Lyon, 91 U. S., 225, 226.

Moore *vs.* Francis, 23 N. E., 1127.

Any oral words spoken falsely of another falling within any one of the first four cases above stated are slanderous *per se*. In the fifth case they are actionable only because of special damages directly resulting therefrom. This action does not fall within the first, second, fourth, or fifth cases above cited. It can fall only within the case cited in the third paragraph. In order to entitle the plaintiff to a recovery he must plead and prove not only that the words were false and malicious, but that they were spoken of and concerning him with relation to an office or employment for profit held by him at the time the words were spoken. Has the plaintiff by pleading and proof brought himself within this rule?

The words used impute dishonesty and lack of integrity. They are not, standing alone, slanderous *per se*. Extraneous facts must be pleaded and proved in order to make them intelligible and applicable as slanderous words. Whenever words have a slanderous meaning, not by their own intrinsic force, but by reason of extraneous facts, such facts must be averred in traversible form, which is called the inducement. The inducement is the statement of facts out of which the charge arises, or which are necessary or useful to make the charge intelligible. Its office is to narrate the extrinsic circumstances which, coupled with the language used, affect its construction and render it actionable, where, standing alone, and not thus explained, the language would appear either not to concern the plaintiff or, if concerning him, not to affect him injuriously.

State *vs.* Grinstead, 61 Pac., 976, 979.

Grand *vs.* Dreyfus, 54 Pac., 389.

Kee *vs.* Armstrong, 5 L. A. R., 1349.

Squires *vs.* State, 45 S. W., 147.

There must be a *colloquium* where words are not slanderous *per se* and extraneous facts are alleged in the inducement. The *colloquium*

is a direct allegation that the words used concern the plaintiff and his affairs, or concern the plaintiff and the facts alleged in the inducement.

Kee *vs.* Armstrong (*supra*).

Pub. Co. *vs.* Wilkins, 218 S. W., 614.

York *vs.* Mims, 200 S. W., 918.

Daniel *vs.* Moncure, 190 Pac., 983.

Tested by these rules the plaintiff is not entitled to recover. His complaint is fatally defective in that there is no traversible allegation therein, that the words used were spoken of and concerning the plaintiff with relation to his employment or office for profit. There is an allegation that the words were spoken of and concerning the plaintiff, but there is no allegation that they were used with relation to the plaintiff's employment or office. Indeed, the proof of the plaintiff clearly discloses that the words spoken by the defendant of and concerning the plaintiff were spoken with relation to his actions and conduct as a delegate during the time of the Democratic National Convention in 1924. That being true, the words did not touch the plaintiff in an office or employment for profit; for it is a matter of common knowledge that the election of delegates to a National Convention of a political party is not an office with a profit attached, but rather is an honorary office where the holder thereof pays his own expenses.

It may be thought that the *innuendo* pleaded in paragraph 5 of the plaintiff's complaint may be construed as an allegation that the words in question were spoken of and concerning the plaintiff with regard to his employment or office. The office of the *innuendo* is only explanatory of the words to which it is attached. It can not enlarge or restrict the natural meaning of the words, nor introduce new matter. If the publication is not actionable *per se* it can not be made so by an *innuendo*.

State *vs.* Grinstead (*supra*).

Grand *vs.* Dreyfus (*supra*).

Kee *vs.* Armstrong (*supra*).

Baker *vs.* Warner, 231 U. S., 588, 592.

If the words used are equivocal or ambiguous and admit of several meanings it is proper to attribute to them in the *innuendo* the fixed and definite meaning which plaintiff things they ought to bear. (Baker *vs.* Warner, *supra*.) The want of proper allegations in the inducement and colloquium can not be supplied by the *innuendo*.

York *vs.* Mims (*supra*).

Med-a-Dent *vs.* Caulk Co., 4 Fed. (2d), 126.

Duvivier *vs.* French, 104 Fed., 278, 281.

The allegation of the plaintiff in paragraph 5 of the complaint, that the defendant meant, and his hearers understood, that the words used unfitted the plaintiff for employment with The Panama Canal or to

represent his coworkers in the Metal Trades Council, can not be deemed to be an allegation of traversible facts that the words were so used. Indeed, in this case, there was no necessity for an innuendo in the complaint; but there was a necessity for alleging in traversible form that the words used were spoken of and concerning the plaintiff *with relation to his office or employment*. The innuendo, as here pleaded, does not supply the lack of such an allegation.

The Court reaches the conclusion that the defendant's motion is well taken and it is accordingly ordered that such motion be and the same hereby is sustained and the plaintiff's action is ordered dismissed, with costs to the defendant, to which the plaintiff excepts.

UNITED STATES *versus* DEPEIZA.

(District Court, Canal Zone, Cristobal Division, June 29, 1925.)

Criminal No. 1540.

1. CRIMINAL LAW. POSTAL LAWS AND REGULATIONS. APPLICABILITY TO CANAL ZONE.

The information in this case charged the defendant with depositing in the United States mails at Gatun a certain lewd and obscene letter, addressed to one W. K. Morris, New Providence, C. Z. It is held that under the provisions of sec. 211 of the Penal Laws of the United States (35 Stat., 112 as amended by 36 Stat., 1339) and sec. 42 of Act No. 8, L. C. Z., 75, that the laws of the United States and the postal regulations made thereunder are applicable to the Canal Zone, and that a person violating the same may be prosecuted and punished therefor.

Attorney for the United States, *F. Edward Mitchell*, United States District Attorney.

Attorney for defendant, *E. A. Reid*.

MARTIN, District Judge. The information in this case charges that the defendant did willfully, unlawfully, and feloniously, on or about June 19, 1925, deposit in the mails at Gatun, Canal Zone, a certain lewd and obscene letter addressed to one W. K. Morris, New Providence, Monte Lirio, Canal Zone; and then follows the copy of the letter which is lewd and obscene in many of its expressions; and the information then alleges that such acts constitute a violation of the postal laws and regulations of the United States.

To this information, the defendant filed a demurrer challenging the jurisdiction of this court on the ground that the penal provisions of the laws of the United States contained in the Postal Laws and Regulations are not in force in the Canal Zone.

Counsel for the prosecution rely on section 211 of the Penal Laws of the United States (35 Stat., 122 as amended by 36 Stat., 1339, 7

Fed. Stat. Anno., 2d Ed., 788) and section 42 of Act No. 8 of the Isthmian Canal Commission found on page 75 of the Laws of the Canal Zone. It is clear that the letter set out in the information is within the terms of said section 211 of the Penal Laws of the United States. The question is whether such law is applicable in the Canal Zone.

This question must be resolved upon the terms of said section 42 of Act No. 8. The section provides:

There is hereby created and established a postal service for the Canal Zone, Isthmus of Panama.

The postal service of the Canal Zone shall be conducted, regulated and controlled by such of the laws, rules and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission.

There are no laws, rules, or regulations enacted by the Isthmian Canal Commission which preclude the United States from prosecuting this action; neither are there any conditions of law and fact or of law or fact existing in the Canal Zone rendering the laws, rules, and regulations of the United States inapplicable. It must be taken, so far as this case is concerned, that such laws, rules, and regulations of the United States are applicable if the postal service on the Canal Zone is to be "conducted, regulated, and controlled" thereby. The word "conducted," as used in this statute, means to carry on; to manage. It is particularly applicable to the work done by the employees in the postal service on the Canal Zone in handling mails deposited in the post office and delivered thereby. The word "regulate," as here used, means to direct by rule or restriction; to subject to governing principles or laws; any rule for the ordering of affairs public or private. It is a term of broad import.

Baltimore vs. Baltimore Trust, etc., Co., 166 U. S., 84.

St. Louis vs. Western Union Tel. Co., 149 U. S., 649.

The word "control," as here used, means to regulate; to govern; to subject to authority over the particular matter. Therefore, when this statute prescribes that the postal service of the Canal Zone shall be regulated and controlled by the laws, rules, and regulations of the postal service of the United States, it means that the laws, rules, and regulations of the United States governing the postal service thereof, so far as applicable here, shall be the law governing postal service in the Canal Zone. As so construed, the Penal Laws of the United States applicable to the postal service are a part of the Laws of the Canal Zone. When Congress adopted the Panama Canal Act, and in section 2 thereof ratified said section 42, such ratification had the effect of making the laws, rules, and regulations of the postal service of the United States applicable to the Canal Zone as much a part of the laws thereof as if Congress had therein declared that such laws,

rules, and regulations should be in force and effect in the Canal Zone. It necessarily follows that section 211 of the Penal Code of the United States, above referred to, is a part of the Laws of the Canal Zone, and that this court has jurisdiction of the action brought to punish a violation thereof occurring in the Canal Zone.

There may be provisions in the laws, rules, and regulations of the postal service of the United States that are inapplicable to the Canal Zone; but, if so, this case does not fall within any such provisions.

The demurrer of the defendant is therefore overruled, to which the defendant excepts.

GOVERNMENT *versus* McNALLY.

(United States District Court, Balboa Division, August 22, 1925.)

No. 2145.

1. APPEAL AND ERROR. SECURITY TO KEEP THE PEACE. SENTENCE TO JAIL.

An action brought under Title VI of the Penal Code (L. C. Z., 102-3) is a criminal action. Sections 63, 64, and 65, construed with section 7 of the Panama Canal Act as amended by Act of Congress of September 21, 1922, barring right of appeal in criminal cases where defendant is not sentenced to jail or not fined exceeding \$25, imposes a jail sentence upon the defendant for failure to give the required undertaking. The case therefore falls within the exception to the proviso in the last paragraph of said section 7 and is an appealable action.

2. APPEAL AND ERROR. NOTICE OF APPEAL. APPEAL BOND.

In an appealable criminal case from the magistrate's court to the district court, the appeal is perfected by: (First) Giving notice of appeal, which may be either oral, in open court, at the time of the rendition of judgment in the magistrate court, or subsequently within 5 days by filing written notice of appeal with the magistrate; and (Second) By giving a bond in such sum not exceeding \$250 as the magistrate may fix. Held that oral notice of appeal given in open court after the magistrate had announced his judgment in the case was a sufficient notice of appeal. Held further that upon the giving of such notice it was the duty of the magistrate to immediately fix the amount of the appeal bond, and that when the appeal bond was deposited, if it was within 5 days after such judgment, the appeal then became perfected.

3. APPEAL AND ERROR. DEPOSIT OF CASH BOND. POWER OF MAGISTRATE AND CONSTABLE.

Where the magistrate indicates the amount of an appeal bond after the defendant in a criminal case has given oral notice of appeal and the defendant then deposits with the proper officer, viz., the constable, the amount of such bond in cash with notification to the constable that it is deposited as an "appeal bond," it is then beyond the power of the magistrate or constable without the defendant's consent to apply such deposit to any other purpose than that of an appeal bond.

4. APPEAL AND ERROR. MAGISTRATE'S TRANSCRIPT OF RECORD. CORRECTION.

Under Code of Civil Procedure, section 71, supplemented by subdivision (e) of rule 23 of this court as embodied in Executive Order of July 28, 1925, where an appeal has been taken from the magistrate's court, the proper procedure for the correction of the magistrate's transcript is to file a motion in the district court, after an appeal has been perfected and the magistrate's transcript of record certified to and filed in the district court, for a correction of such record. Where it clearly appears from a hearing on such motion that the magistrate's record does not truly state the proceedings in the magistrate's court, the district court, in furtherance of justice, may order the correction of the magistrate's transcript so that the same will truly show the actual proceedings in the magistrate's court.

5. APPEAL AND ERROR. APPEAL FROM JUDGMENT. AFTER PERFORMANCE.

It is the general rule to which there are exceptions, that a voluntary compliance with a judgment by payment or performance is no bar to an appeal where repayment or restitution may be enforced or the effect of compliance may be otherwise undone in case of reversal.

Attorneys for plaintiff, *F. Edward Mitchell* and *J. J. McGuigan*.

For himself, *L. L. Gilkey*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. August 5, 1925, a complaint was filed before Judge Gilkey, acting magistrate in the Balboa Division, charging the defendant with disorderly conduct. The defendant was arrested on a warrant in this case 10 minutes before 1 o'clock p. m. He was taken to the Ancon police station and arrived in the magistrate's court about 10 minutes before 2 p. m. On being arraigned, he asked for time in which to procure the services of an attorney, which request the magistrate denied. A hearing was then had in the case, the defendant was found guilty of disorderly conduct, judgment was entered, the defendant gave notice of appeal and deposited an appeal bond fixed by the court at \$150. Immediately thereafter the defendant was arrested on a warrant in this case. The action was brought under the provisions of Title VI of the Penal Code (L. C. Z., 102-3). The testimony of some of the witnesses in this case show that no witnesses were sworn and examined in the case; the magistrate says that the complaining witness and the defendant were examined, whereupon the magistrate entered judgment in said case requiring the defendant to deposit a bond as security to keep the peace in the sum of \$100. Notice of appeal was then given by the defendant from such judgment. After the judgment in this case had been announced by the magistrate, L. S. Carrington, an attorney at law who had been telephoned by some third party that his services were needed in this case, appeared upon the scene. The magistrate was

requested by him to permit the \$150 which had been deposited in the disorderly conduct case to stand as the appeal bond in both cases, which request was refused, the magistrate saying that the defendant must deposit \$100 in this case. Thereupon the defendant and his attorney delivered to the constable, the proper officer to receive cash deposited as bonds in the magistrate's court, the sum of \$100, which they stated to the constable was deposited as an appeal bond in this case. The constable accepted the money and then consulted with the magistrate, separate and apart from the defendant and his attorney, as to whether the money should be treated as a peace bond or an appeal bond, and the magistrate directed him to treat it as a peace bond, and he accordingly made out and delivered to the defendant a receipt, reciting that the \$100 was deposited as a "peace bond." This receipt the defendant did not read at that time, nor did his attorney, but after the two had gone to the attorney's office the attorney read the receipt and discovered that it designated the sum deposited as a "peace bond," some time after 4 o'clock in the afternoon and too late to communicate with the magistrate on that day. The following morning the attorney for the defendant communicated with the constable and called his attention to the fact that the money had been deposited as an appeal bond in the case and not as a "peace bond," and that the receipt was incorrect, and requested that the matter be corrected in the magistrate's court. The constable conferred with the magistrate, and the magistrate then talked with such attorney, and the matter was explained to him and he refused to permit the sum to be treated as an appeal bond but declared that it must remain there as a peace bond. The magistrate certified the papers and record to the district court in the disorderly conduct case promptly, as required by law, but did not certify the papers in this case. The defendant was thereafter compelled to and did institute a mandamus proceeding to require the magistrate to certify the record in this case to this court, and in compliance with the writ of mandate the record in this case was certified to and filed in this court on August 12, 1925.

The record of the magistrate shows that the defendant was ordered to furnish a bond of \$100 to keep the peace; that the bond was deposited and the defendant was discharged. The record did not disclose the fact of the giving of notice of appeal. Thereupon the defendant filed a motion in this court under the provisions of section 71 of the Code of Civil Procedure and subsection (e) of section 23 of the rules of this court adopted by Executive Order of the President, July 28, 1925, to have the record corrected to show that notice of appeal was duly given and that the \$100 deposited was an appeal bond. This motion was made August 18 and an order was duly issued requiring Magistrate Gilkey to correct his record so that the

transcript thereof should show a correct statement of the facts and proceedings at the hearing of this case in the magistrate's court. On August 19, in compliance with that order, a corrected transcript of record was certified to and filed in this court by the magistrate, showing that notice of appeal was given in open court at the time of the hearing in behalf of the defendant but failing to show whether any appeal bond was given. The defendant filed a supplemental motion on August 20, 1925, asking for an order requiring Judge Gilkey to appear and show cause why the transcript should not be further corrected to show that the \$100 deposited was an appeal bond and not a "peace bond." Upon such motion the court ordered Judge Gilkey to appear August 21, 1925, and show cause why the magistrate's record should not be corrected as contended by the defendant, and pursuant to such order the magistrate appeared and a hearing was had on oral evidence with respect to such matter. Such other facts as may be material to the determination of this case will hereafter appear.

Two principal questions are presented for the determination of the court, to wit:

1. Is this action a criminal action, appealable from the magistrate's court to the district court under the laws of the Canal Zone?

2. Was the sum of \$100 deposited with the constable by the defendant on the 5th day of August, 1925, a peace bond or an appeal bond?

The Executive Order of November 7, 1908 (E. O., 85), provides in substance for an appeal from a judgment of the district court (now magistrate's court) by the defendant giving notice in open court, or within 5 days after judgment, giving a written notice of appeal and within the same time depositing a bond in a sum to be fixed by the judge not to exceed \$250.

The Executive Order of March 12, 1914 (E. O., 163-4), section 6, provides that appeals in criminal and civil cases are authorized from the judgments and rulings of the magistrate's court to the District Court of the Canal Zone, and in like manner as appeals have been heretofore allowed from the district courts of the Canal Zone to the circuit courts thereof.

Section 7 of the Panama Canal Act, as amended by the Act of September 21, 1922, provides:

Appeals in civil and criminal cases are hereby authorized from the judgments and rulings of the magistrate's court to the district court under the rules and regulations prescribed by section 6 of the Executive Order of March 12, 1914, relating to the Canal Zone judiciary; provided, however, that there shall be no right of appeal in criminal cases except in those cases wherein the defendant has been sentenced to jail or has been fined in amount exceeding \$25.

Title 6 of the Penal Code (L. C. Z., 102-103), under which this action was brought, provides the procedure in actions of this kind, and when,

upon hearing, the defendant should be discharged, and when he should be required to give security to keep the peace. Section 64 therein found, provides:

If the undertaking required by the last section is given, the party informed against must be discharged; if he does not give it the court shall commit him to jail, specifying in the warrant the requirement to give security, the amount thereof, and the omission to give the same.

Section 65 provides that:

If the person complained of is committed for not given the undertaking required, he may be discharged upon giving the same.

It is to be noted, however, that under the provisions of section 7 of the Panama Canal Act as amended by the Act of September 21, 1922, the jurisdiction of the magistrate as to imprisonment in criminal cases is limited to 30 days, and it is questionable if the magistrate could require the defendant in a case under Title VI of the Penal Code to remain in jail for a longer period than 30 days for failure to give a peace bond; but it is not necessary for the court to decide that question, and it is not, therefore, decided.

The question then arises whether or not this is a criminal proceeding? Actions for security to keep the peace are found in the Penal Code of the Canal Zone. Title VI is devoted to this subject matter as found in the Penal Code. It is true that in such a proceeding the defendant can not be convicted of a crime, nor fine, nor imprisonment imposed upon such conviction. This chapter, however, does apply to that branch of the criminal law which seeks to prevent the commission of crimes. While no conviction of crime may be had in the proceeding, nor a fine imposed, yet if the magistrate finds that there is a necessity for restraint of the defendant, he may fix a bond in a sum not exceeding \$1,000, and may require the defendant to give that bond. If the bond be not given the defendant may be committed to jail for failure to give the bond. If the proceeding is not criminal, why are the provisions describing the same found in the Penal Code? Is it not penal to subject the defendant to imprisonment for failure to give the bond? It is true that our law as found in Title VI of the Penal Code is practically a copy of the California law on the same question. It is also true that the California Supreme Court, in the case of *Holliday vs. Holliday*, 55 Pac., 703 at 704, holds that no appeal lies from an order of the magistrate requiring the giving of security to keep the peace, and that the judgment of the magistrate in such a case is final and conclusive. It is true that where statutes have been adopted from another jurisdiction, the decisions in that other jurisdiction construing such statutes have persuasive force. A case similar to that of the case at bar is that of *State vs. Gillian*, West Virginia (57 L. R. A., 426) where the Supreme Court of West Virginia holds that the requirement that the defendant

give security to keep the peace and where the consequence of failure to give the required security is imprisonment, is punishment. The rule announced in the latter case, under the law as it stands in this jurisdiction, is more persuasive than the rule announced in the California case. It is accordingly held that the proceeding in this case is a criminal case.

Section 7 of the Act of Congress of September 21, 1922, authorizes the appeals in civil and criminal cases from the magistrates' courts to this court. The section goes on to say:

Provided, however, that there shall be no right of appeal in criminal cases except in those cases wherein the defendant has been sentenced to jail or has been fined in amount exceeding \$25.

But for this provision the court would unhesitatingly hold that the defendant has a right of appeal. The proviso in this statute however, makes the interpretation of this provision, together with the chapter on security to keep the peace, most difficult. The purpose of the proviso, as evidenced by its language and by the hearings before the Interstate and Foreign Commerce Committee of the House of Representatives on November 9, 1921, was to bar the right of appeal in petty criminal cases where the fines were small and no jail sentence was imposed. (See "Hearing on H. R. 4809, Nov. 9, 1921," p. 17).

Under the provision of section 64 of the Penal Code, in the chapter on "Security to keep the peace," it is provided that if the undertaking required as security is given, the defendant must be discharged. If, however, he does not give it, the court shall commit him to jail. There is no provision in this law relating to security to keep the peace that the court in its judgment entry shall make an order committing the defendant to jail. The provision of the law in that respect is that if the magistrate finds reasonable cause therefor he may require the defendant to enter into an undertaking to keep the peace toward the Government of the Canal Zone and particularly toward the informer. The effect of these provisions is this, that when, as in this case, the magistrate requires the undertaking to be given and it is not given, then without the making of a record entry of any kind the magistrate may issue a committment directing the proper officer to confine the defendant in jail until he gives the undertaking. The record of the magistrate in this case shows that the defendant was required to give a bond of \$100 to keep the peace, and that requirement carried with it the imposition of a jail sentence unless the security was furnished just as effectually as if the record had itself recited the imposition of the sentence. In other words, the law directing the issuance of a committment to place the defendant in jail if he does not furnish the undertaking becomes a part of the record entry of the court where the magistrate requires the giving of the undertaking as effectually

as if the magistrate had inserted that provision in the record. The court is constrained, therefore, to hold that the record of the magistrate in this case imposes a jail sentence for failure to furnish the required undertaking and as a necessary consequence that the defendant had the right to appeal from such judgment. Any other construction would make it possible for a magistrate in any case brought under Title VI of the Penal Code, even though the facts did not warrant it, to require a defendant to give security to keep the peace and if he failed to give the security, or was unable to give it, to impose imprisonment which in a particular case might be very inequitable and unjust, and the defendant would have no remedy for a correction of the misuse of the power of the magistrate. It is not often that such abuse of power occurs, but when it does occur there should be a remedy for a party who has been unjustly dealt with.

The objection is made that because the defendant deposited the \$100 with the constable of the magistrate's court and the constable gave him a receipt showing that the deposit was for the peace bond required by the judgment of the court, that the defendant is now barred from his right of appeal because he has performed the judgment of the court. For the purposes of this question the court will assume that the \$100 deposited was deposited as a peace bond. This, however, does not bar the right of appeal under the facts of this case. The prevailing rule is, that a voluntary compliance with the judgment of the court by payment or performance is no bar to an appeal or writ of error for its reversal where repayment or restitution may be enforced, or the effect or compliance may be otherwise undone in case of a reversal.

3 C. J., 676.

Dakota County vs. Giddon, 113 U. S., 222 at 224.

Josevig, etc., Co. vs. Howarth Co., 261 Fed., 567, (9th C. C. A.)

There are some exceptions to this rule, as, for instance where the parties pending appeal have effected a compromise and settlement of the matters in controversy and the like, and the prevailing rule is not announced by this court as the rule in all cases; but it is the rule applicable to this case for the reason that if the defendant's appeal has been perfected and if the case should be reversed upon a trial in this court, the bond deposited is in the registry of the court where it can be returned to the defendant. The case, therefore, falls within the prevailing rule above announced.

Having determined that the case is a criminal case, and that the defendant has a right to appeal, the next question for consideration is whether the defendant has perfected his appeal. Stated in other words, was the \$100 deposited by him in the magistrate's court an appeal bond or a peace bond? This is largely a question of fact. It

appears from the corrected record of the magistrate that notice of appeal was given in open court at the time of the rendition of the magistrate's judgment, so that so far as the giving of notice is concerned the defendant has complied with the statute. The defendant, in order to perfect his appeal, must not only give notice of appeal as required by statute, but he must, within 5 days after the judgment, deposit with the magistrate an undertaking on appeal. When the magistrate was notified that the defendant would appeal it was his duty to fix the amount of the appeal bond so that the defendant might give the necessary undertaking to perfect his appeal. The evidence in the case is conflicting as to whether the magistrate fixed \$100 as the amount of an appeal bond or not. But it is apparent from the evidence that the defendant and his attorney, who was then present, so understood it, and that the amount was fixed at \$100. They proceeded to pay to the constable the sum of \$100, telling him that it was an appeal bond. Such sum having been tendered to the constable as an appeal bond, and having been received by him under such circumstances, it could not thereafter either at the direction of the magistrate or at the instance of the constable without the defendant's consent, be transformed into a peace bond. It was the duty of the constable, under such circumstances, to accept the sum tendered as an appeal bond and give a receipt therefore for the purpose of an appeal, or to refuse the sum. Instead of doing this, the constable consulted with the magistrate without the hearing of the defendant and his attorney and the magistrate directed him to take the money as a peace bond and to give a receipt for the same as such. The bond having been tendered by the defendant and his attorney as an appeal bond the magistrate had no power or authority to direct that it be treated as a peace bond. In other words, neither the constable nor the magistrate, without the consent of the defendant, could accept the defendant's money knowing that it was deposited as an appeal bond and then divert it to another and different purpose. It is contended, however, that the defendant accepted the receipt offered in evidence as given by the constable specifying the deposit of \$100 to be a peace bond, and that he made no objection thereto, thus evidencing his consent that the money might be treated as a peace bond. The defendant however says, and the court finds that to be a fact, that he did not examine the receipt until after 4 o'clock, when the magistrate's office was closed, and when the defendant and his attorney were having a consultation in the attorney's office, and the next morning the defendant's attorney sought to have the records of the magistrate's court corrected to show that the amount deposited was furnished as an appeal bond, and when met with a refusal to treat the money as an appeal bond has pursued the proper remedy in order to have it declared an appeal bond.

Taking all these facts into consideration, together with the action of the magistrate in arbitrarily forcing the defendant to proceed to trial without the services of an attorney, and refusing to accord to him a reasonable time to procure the services of one, in violation of the fundamental law of the Canal Zone; taking into consideration the fact that in the hearing in the court below the magistrate propounded to the defendant certain questions with respect to the facts in the case without advising him of his rights and thus making him a witness against himself, which is in violation of the fundamental law of the Canal Zone; and taking into consideration the fact that the magistrate failed to accord to the defendant and his attorney the courtesy and fair dealing required of a magistrate toward a litigant in his court, the court reaches the conclusion that the \$100 deposited by the defendant in this case on the fifth day of August, 1925, must be deemed and treated as an appeal bond in the case, and that the appeal was duly perfected. An order will therefore be made requiring L. L. Gilkey, acting magistrate of the Balboa Division of the Canal Zone on the fifth day of August, 1925, to correct the record of said case in the magistrate's court by striking out the recital that the defendant deposited \$100 cash as a peace bond to keep the peace, and insert in lieu thereof that such \$100 was deposited as an appeal bond, and that such record when so corrected shall be certified to this court in its corrected form.

REEVES *versus* REEVES.

(District Court, Canal Zone, Balboa Division, September 3, 1925.)

Civil No. 719.

1. ABATEMENT. *RES JUDICATA*.

A plea of *res judicata* is a plea in bar and not in *abatement*.

2. PLEADING. *RES JUDICATA*:

A plea in bar such as *res judicata* is a defense to the action, or a part thereof, and should be pleaded by way of answer unless the facts upon which it is based appear on the face of when complaint, when the objection should be raised by demurrer.

3. TRIAL. SEPARATE TRIAL.

Defendant is not entitled to a separate trial on a plea in bar.

Attorney for plaintiff, *Felix E. Porter*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. This is an action for divorce brought by the plaintiff on the ground of extreme and repeated cruelty. The allegations of the petition cover a period of time both before and after September 17, 1924. It is alleged by the defendant that on the latter date Judge Wallingford, of this court, entered a judgment denying

the plaintiff a divorce on the same cause of action set out in the plaintiff's complaint. In other words, the defendant pleads a former adjudication.

Application has been made to the court to try the question of former adjudication in advance of the trial upon the merits, *i. e.*, to separate the issues and try one of the issues first.

The divorce code contains no provisions as to how issues in divorce actions shall be tried. Our Code of Civil Procedure, section 82, provides that the only pleadings allowed on the part of the plaintiff shall be the complaint and the demurrer to the answer, and on the part of the defendant the demurrer to the complaint and the answer. Section 87 provides that the answer shall contain (first), a general or specific denial, and (second), a statement of any new matter containing a defense or counterclaim. There is no provision for a reply to any new matter nor any special defense set up by the defendant's answer except section 97 of such code, which grants plaintiff the right, at plaintiff's election, to reply thereto by an amendment to the complaint, and if the plaintiff does not amend his complaint in that regard "he shall be deemed to have controverted every material statement of the answer." It will therefore appear from the provisions of the code with respect to pleading that the issues are now completely framed on the plea of former adjudication interposed by the defendant. The sole question for determination is, whether this plea of former adjudication should be first tried before proceeding with a trial upon the merits.

The defense of a former adjudication is a plea in bar.

1 C. J., 29.

19 C. J., 176.

Unless the facts appear upon the face of the complaint and the objection may therefore be raised by demurrer, this plea must be interposed by answer. A "plea in bar" seeks to put an end to the controversy; it goes to the subject matter of the action and seeks to defeat the right of the plaintiff to recovery upon the cause of action pleaded, or the right of the plaintiff to recover at all. It includes such defenses as, the fact that an action was not commenced within the period of limitations; that the plaintiff had no interest in the subject matter of the suit at the time it was commenced; that one suing as a commissioner is not a commissioner; that one of two persons sued as a partner is not a partner; that defendant in an attachment proceeding is not indebted to the plaintiff; that the plaintiff is an action for possession of real estate has no title; that the obligation on which the suit is based has been paid; and like defenses. It is held in *Farnum vs. Bank*, 107 Pac., 568, that, a wife's capacity to maintain an action for recovery of her separate property need not be first tried before trying the merits of the action.

It is apparent that a plea in bar is defensive matter, and as such, under our system of code pleading, it is properly triable together with the other issues in the case.

It will, therefore, be ordered that the application for a separate trial of the issue of former adjudication raised by the defendant's answer be denied.

REEVES *versus* REEVES.

(District Court, Canal Zone, Balboa Division, September 16, 1925.)

Civil No. 719.

1. DIVORCE. JUDGMENTS. *RES JUDICATA*.

The doctrine of *res judicata* is applicable to divorce actions to the same extent and with the same limitations as the doctrine is applied in other actions. Where it appeared that the plaintiff prosecuted an action against the defendant for a divorce on the ground of extreme and repeated cruelty, ending in a judgment denying the plaintiff's petition for a divorce on September 17, 1924, where it appeared that the plaintiff in this action sought a divorce on the same ground, setting up facts alleged to constitute extreme and repeated cruelty both before and after September 17, 1924, it is held that the judgment in the first case concludes the plaintiff from pleading, proving, or relying upon transactions between the parties prior to September 17, 1924, but that the plaintiff is entitled to plead and prove transactions occurring subsequent to that date.

2. DIVORCE. EVIDENCE. BURDEN OF PROOF.

Where the wife sues for a divorce on the ground of extreme and repeated cruelty, she must under the divorce code show that the defendant has committed acts (1) involving grievous bodily injury; or (2) acts producing grievous mental suffering, endangering life, health, or reason; and (3) that she was without fault in the transactions of which she complains. The burden of proof is upon the plaintiff to establish the ground alleged for a divorce and that the plaintiff was without fault.

3. JUDGMENTS. FORM OF. VALIDITY.

Where the court having jurisdiction of the parties and the subject matter of an action tries a case at issue by hearing evidence, and after the submission of the case announces in open court the decision of the court, and the clerk records such decision in the minute book of the court in which all orders, judgments, and decrees of the court are recorded, and where such record shows the title of the court and cause, the nature of the action, that a trial was had and a denial of the relief demanded by the plaintiff in her petition, such record has all of the elements of a valid judgment and will be so considered.

Attorney for plaintiff, *Felix E. Porter*.

Attorney for defendant, *L. S. Carrington*.

MARTIN, District Judge. Plaintiff brings this action for a divorce from the defendant on the ground of extreme and repeated cruelty. The parties were married October 29, 1919. The allegations of the

plaintiff's petition show that the alleged cruelty commenced shortly after the marriage and continued until the filing of her petition, August 7, 1925.

The defendant answered (1) by general denial; (2) by alleging defensive matter; and (3) by a plea of *res judicata* based upon a judgment alleged to have been rendered September 17, 1924, by this court in civil case No. 658, wherein the parties were the same, the plaintiff seeking a divorce in that action on the ground of extreme and repeated cruelty and wherein the court denied the plaintiff's application for a divorce.

1. The proof in this case with respect to the plea of *res judicata* shows that on June 2, 1924, this plaintiff filed her petition in this court for a divorce from the defendant on the ground of extreme and repeated cruelty beginning shortly after the marriage of the parties and continuing until the filing of such petition. The defendant appeared in that action and filed an answer of general denial and defensive matter. The court had jurisdiction of the parties and of the subject matter of the action. The case was tried September 17, 1924. Witnesses were sworn and examined in behalf of both parties. At the conclusion of the trial, in open court, after reviewing the facts at some length the court announced its findings that the parties were mutually at fault; that the plaintiff's evidence was insufficient to warrant the relief demanded by her; and the court announced its decision that the plaintiff be denied a divorce. Pursuant to such findings and decision the clerk entered in the docket the minutes of the proceeding, including the names of the witnesses sworn and examined, the completion of the trial, and the decision of the court. He also entered in the minute book, the permanent record of the court in which all orders, judgments, and decrees thereof are recorded, the title of the court and the cause, the nature and number of the action and the following:

This cause coming on regularly this day for hearing and trial, and the parties hereto being present in person and by counsel, and the issues being duly joined and announcing ready, trial is had, and the court after considering the evidence adduced and being fully advised in the premises, denies the application for a divorce.

Upon this state of the record it is contended by the plaintiff that no judgment was in fact entered. This contention is untenable. Under the provisions of sections 126 and 459 of the Civil Code of Procedure, it is the duty of the clerk, after the court has announced the decision of the case, unless otherwise ordered, to enter the judgment in the record. (*Beckford vs. P. R. R. Co. supra.*) It is not necessary that the judgment be in any particular form if it appears therefrom with certainty what relief was given or denied by the court. (20 Howard, 94—20 Howard, 270.) When the court announced its

decision, denying the relief demanded by the plaintiff in her petition in the former action, and the clerk made the entry in manner and form as shown by the proof in this case, there was a valid judgment entered in that action.

It is further contended by the plaintiff that such judgment is not available to the defendant as a plea of *res judicata* because the plaintiff's petition in this action covers the time subsequent to as well as before September 17, 1924. It appears without dispute that the court in the former action had complete jurisdiction; that the parties to that action are identical with the parties in this, and it appears from the plaintiff's petition in the former action and her petition in this action, detailing occurrences prior to September 17, 1924, that the two causes of action were identical, and that all of the matters and things pleaded by the plaintiff in her petition in this case prior to said date were necessarily involved in and determined by the judgment in the former action. Such judgment must, therefore, be deemed conclusive of the plaintiff's rights which were asserted, litigated, and determined in such action, as well as all rights which she might have litigated therein which were then known or by the exercise of reasonable diligence might have been known to her at that time if such rights were within the issues in that case. It is true, however, that such judgment does not conclude the plaintiff as to matters which occurred after the date of such judgment.

Counsel for plaintiff has contended that the doctrine of *res judicata* does not apply to an action of divorce on the ground of extreme and repeated cruelty; that the term "extreme and repeated cruelty" indicates a continuing series of acts resulting in the infliction upon the innocent party of grievous bodily injury, or producing grievous mental suffering, endangering life, health, or reason. The doctrine of *res judicata* rests on the policy that it is for the public interest to make an end to litigation; that without the application of the doctrine, suits may be immortal, while the litigants are mortal. The leading case in the Supreme Court of the United States is *Cromwell vs. County of Sac*, 94 U. S., 351, wherein Mr. Justice Field, speaking for the court, laid down the following general rule of law which has been followed in subsequent cases:

There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose, * * * but where the second action between the same parties is upon a different claim or demand, the judgment in the prior

action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

This doctrine was approved in the late case of United Shoe Machinery Corporation, *et al. vs. United States*, 258 U. S., 451 at 458. The cases cited by the plaintiff from the U. S. Supreme Court dealt with a different state of facts to that presented in this case, but in them the same general rule above quoted is recognized. The cases which might be cited in support of the doctrine announced in the Cromwell case are in number as the sands of the sea, and no good purpose would be served by citing or reviewing them. This court is content to rest its opinion upon the doctrine of the Cromwell case as reaffirmed in the United Shoe Machinery Co. case, *supra*.

With respect to the contention of the plaintiff that this doctrine of *res judicata* is not applicable to a divorce action, the court finds that the overwhelming weight of authority declares that the doctrine is applicable to divorce actions the same as to other actions.

Glander *vs.* Peat (La.), 8 So., 884.
 Wagoner *vs.* Wagoner (Md.), 25 Atl., 338.
 Morrison *vs.* Morrison (Mass.), 8 N. E., 59.
 Searcy *vs.* Searcy (Mo.), 993 S. W., 871.
 Prall *vs.* Prall (Fla.), 26 L. R. A., N. S., 577.
 Chapman *vs.* Chapman (Ia.), 165 N. W., 96.
 Peterson *vs.* Peterson (Minn.), 70 N. W., 865.
 Lynn *vs.* Lynn (Kan.), 147, Pac., 1117.
 Ford *vs.* Ford (Okla.), 108 Pac., 366.
 Tillison *vs.* Tillison (Vt.), 22 Atl., 531.
 Matlock *vs.* Matlock (Or.), 165 Pac., 311.
 Appleton *vs.* Appleton (Wash), 166 Pac., 61.
 Patrick *vs.* Patrick (Wis.), 121 N. W., 130.

The court finds no good or persuasive reason for holding that the doctrine of *res judicata* should not be applied to a divorce case, and the rule in this jurisdiction is now declared to be that such doctrine is applicable to divorce actions to the same extent and with the same limitations as the doctrine is applied in other classes of actions; and therefore holds that the right of the plaintiff to a divorce based upon the facts occurring prior to September 17, 1924, showing or tending to show extreme and repeated cruelty, are not available to the plaintiff in this action as grounds for a divorce.

2. Is the plaintiff entitled to a divorce upon the facts occurring after the rendition of the judgment in the former action on September 17, 1924? It appears from the findings and decision of the court in that case that up to that time both parties were at fault; that the plaintiff had not cooperated with the defendant in the marital relations existing between them. It appears that defendant was assigned to permanent work at Cristobal in May, 1924, where he has since been employed. On two different occasions since September 17, 1924, he

has procured quarters there and requested the plaintiff with their child to come there and live with him, which she refused to do. After plaintiff was denied a divorce in the former action it was her duty to live with her husband and cooperate with him in making a home for the family; this she has refused to do, but has insisted upon living separate and apart from him, thus forcing him to maintain her in a separate home and casting on him an undue burden of expense. She gives as her reason for such refusal that she is afraid to live with him, and that her friends live near Balboa where she is living, and that she has no friends at Cristobal. Neither reason is sufficient for her conduct. The facts upon which she says she bases her fear of the defendant occurred prior to the judgment in the former action and were involved therein, and that judgment concludes her in that respect, and such reason is not therefore tenable. The fact that her friends do not live in Cristobal where her husband has provided a home for her is no reason at all for refusing to live with him. She has denied defendant all conjugal rights, and has failed or refused at all times since September 17, 1924, to cooperate with him in marital matters. In this attitude she is not justified unless she has shown that she is entitled to a divorce on transactions occurring since September 17, 1924. Do these transactions entitle her to a divorce? The burden of proof is on her to prove that she is entitled thereto. It must appear from the greater weight of the evidence that since September 17, 1924, the defendant has committed acts (1) involving grievous bodily injury; or (2) producing grievous mental suffering, endangering life, health, or reason; and (3) that the plaintiff was without fault in the transactions which are the ground of complaint. It is undisputed that the defendant has not inflicted bodily injury upon the plaintiff during the time mentioned and she is not entitled to a divorce for the infliction of grievous bodily injury. The facts testified to by the plaintiff upon which she relies are positively denied by the defendant. In one instance the plaintiff is corroborated by a servant. This is the transaction testified to by the plaintiff and the servant as occurring on July 20, 1925, when it was claimed that the defendant exposed his person to the plaintiff in the presence of the servant and the minor child of the parties. The wife first testifies that this occurred in the defendant's bed room but changed her testimony and said that it occurred in the kitchen. The servant testifies that it occurred in the kitchen. It is said that the defendant, without any controversy between the parties, dropped his pants and exposed his person under such circumstances. In the first place, under the facts shown in this record as to the character and conduct of the defendant, the presumption obtains that he would not do such an indecent thing. It is not at all certain from the facts in this record but that the defendant was

in Costa Rica at the time when the plaintiff and the servant say this transaction occurred, and in view of all of the circumstances relating to this matter disclosed by the record, the Court is impelled to hold and does hold that the plaintiff has failed to sustain the burden of proof with respect thereto, as she has failed to sustain that burden upon every other transaction testified to by her since September 17, 1924, upon which she bases her right to relief.

Divorce actions are equitable actions. Section 16 of the divorce code so declares. It is a fundamental rule in equitable actions that a plaintiff coming into a court of equity must come with clean hands. The rule is just as firmly established that a plaintiff in a divorce action must be without fault in the transactions upon which the divorce action is based. In this case the plaintiff has pursued a course of conduct since September 17, 1924, which places her in the position of being at fault in connection with the marital relations between the parties.

There is another reason why the plaintiff's petition must be denied: Her proof must establish by the greater weight thereof not only that she was not at fault, but that the defendant has committed acts producing mental suffering to such a degree as has endangered her life, health, or reason. Her life has not been endangered; there is no evidence in the record that her health has been impaired; she appears to be a strong, healthy woman, and such testimony as she gave relating to illness shows that such illness was not likely to have been produced by any acts which the defendant has committed since September 17, 1924. Her reason appears to be wholly unimpaired. Her proof upon these questions, therefore, is wholly insufficient to support a decree in her favor.

The court reaches the conclusions, therefore, that (1) the objections of the plaintiff to the offered proof of the defendant, the rulings upon which were reserved, should be and they are hereby overruled and plaintiff is given an exception; (2) the objections of the defendant to the proof of transactions prior to September 17, 1924, upon which the plaintiff relies, and on which rulings were reserved, should be and they are hereby sustained, and the plaintiff is given an exception thereto; (3) that the plea of *res judicata* concludes the plaintiff as to all transactions between the parties prior to September 17, 1924; and (4) that the plaintiff's proof fails to show that she is entitled to a decree in this action and her petition for a divorce is denied. Let judgment and decree be entered accordingly.

GILLETTE *versus* GILLETTE.

(District Court, Canal Zone, Balboa Division, September 25, 1925.)

Civil No. 718.

1. DIVORCE. PLEADING. JURISDICTION.

The plaintiff in a divorce action must at the inception of the action by a verified complaint, or a complaint and affidavit, required by subdivision (b) of Sec. 13 of the divorce code, show every jurisdictional fact necessary to maintenance of the action; and a failure in this regard precludes the court from taking or exercising jurisdiction in the action.

2. DIVORCE. RESIDENTIAL COMPETENCY. HOW SHOWN.

The residential and occupational competency of the plaintiff to maintain the action is required to be shown by an affidavit stating the facts required in subdivision (b) of Sec. 13 of the divorce code; but if such facts are fully shown in a verified complaint, the complaint may be treated as an affidavit in lieu of the affidavit required by subdivision (b) of Sec. 13 of the divorce code.

3. DIVORCE. AFFIDAVIT OF RESIDENCE AND OCCUPATION. MANDATORY PROVISIONS.

The provisions of subdivision (b) of Sec. 13 of the divorce code, requiring the plaintiff in a divorce action to furnish a sworn statement of facts as to residence and occupation, are mandatory and must be complied with to give the court jurisdiction of the action.

4. DIVORCE. PUBLICATION OF PROCESS. PROOF OF FACTS AT TRIAL.

Where a plaintiff procures publication of process on an absent defendant in a divorce action, the proof upon the trial of the action must show the truth of the statements contained in the affidavit upon which the service by publication is based; and if the facts upon the trial disclose that the case is not one where publication of process may be had, the service by publication is void and the court acquires no jurisdiction to try and determine the action or to render a valid decree binding upon the parties.

Attorney for plaintiff, *E. M. Robinson*.

No appearance for defendant.

MARTIN, District Judge. This is a divorce action. The plaintiff alleges in his petition the marriage of the parties in September, 1919, in the Canal Zone; willful and continuous desertion of the plaintiff by the defendant since January, 1921; that the plaintiff was not at fault; and that the "plaintiff is a resident of Balboa and an employee of the Army and Navy Y. M. C. A. and has been employed in the Canal Zone for the past 7 years." There is a prayer for absolute divorce. The petition is unverified. No affidavit was filed with the petition stating the particulars as to plaintiff's residence or occupation as required by subdivision (b) of section 13 of the divorce code. The petition was filed August 1, 1925; summons issued on that date and the same was returned by the marshal, August 20, 1925, showing

that the defendant could not be found in the Canal Zone. Affidavit of plaintiff for publication of process was filed August 21, 1925, reciting the marriage of the parties, that the defendant has since gone out of the Canal Zone to evade her marital obligations, that she is a nonresident of the Canal Zone and resides in the city of Panama, Republic of Panama, and that plaintiff "resides at Balboa, Canal Zone, and has resided at said place for a period of more than 1 year for legitimate occupation and purposes." The clerk made an order of publication of process, issued notice of pendency of suit, and the same was published for 3 successive weeks. Due proof of publications was made and filed, showing the first publication occurred on August 22, 1925. September 24, 1925, on application of the plaintiff a trial was had and plaintiff's evidence was duly submitted. The defendant did not at any time appear in the action.

The offered testimony shows that the parties were married at the time and place alleged. At that time the plaintiff was in the employ of the Army and Navy Y. M. C. A. at Balboa, C. Z., in the capacity of chauffeur, and had been occupying quarters in the building used by that organization. There were no suitable quarters in the building for the use of the parties hereto as a home. Therefore, immediately after the marriage the plaintiff rented quarters in Panama, Republic of Panama, and the parties there established their home, where they continued to live until January, 1921, when the plaintiff obtained quarters in the Canal Zone and requested the defendant to come here to live with him. This the defendant refused to do. The parties then separated, the plaintiff going back to his bachelor quarters in the Army and Navy "Y" building at Balboa and the defendant continuing to live in Panama, where she still resides. The plaintiff has proved, by two disinterested witnesses, continuous residence in the Canal Zone since that time, where he has at all times been employed as chauffeur by the Army and Navy "Y." Upon this state of the record two questions intrude: (1) Did the court acquire jurisdiction of this action upon the filing of an unverified complaint without the filing of the affidavit required by subdivision (b) of section 13 of the divorce law; (2) under the facts disclosed, did the court acquire jurisdiction of the action by substituted service of process?

1. As to the first question. In a divorce action it is necessary for the plaintiff to allege and show by his initial pleadings and papers every necessary jurisdictional fact.

Rumping vs. Rumping (Montana), 91 Pac., 1057, s. c. 12 L. R. A., N. S., 1197 and cases cited.

Ramsdell vs. Ramsdell (Wash.), 47 Pac., 21.

Thelen vs. Thelen (Minn.), 78 N. W., 108.

Beekman vs. Beekman (Fla.), 43 So., 923.

Hinkel vs. Lovelace (Mo.), 102 S. W., 1015, s. c. 11 L. R. A., N. S., 730.

Ayres vs. Gartner (Mich.), 51 N. W., 461.

Miller vs. Miller (Ind.), 104 N. E., 588.

Wills vs. Wills (Ind.), 96 N. E., 763.

Rayl vs. Rayl (Tenn.), 64 S. W., 309.

These necessary jurisdictional facts in this jurisdiction are: (1) The marriage of the parties; (2) a statutory ground for divorce; and (3) the requisite good faith residence of the plaintiff. Without the showing at the inception of the action of such essential facts the court acquires no jurisdiction of the action. (See cases above cited.) The plaintiff in his petition alleged the marriage of the parties and a statutory ground of divorce. But did he make the requisite showing as to his residence and occupation? This question must be answered in the negative.

Our divorce law provides, in subdivision (b) of section 13, that:

No person shall be entitled to a divorce in pursuance of the provisions of this act who has not actually resided on the Canal Zone continuously during the whole year next before the filing of his or her petition * * * ; and the petitioner shall file with the petition his or her own affidavit in which he or she shall state the length of time the petitioner has resided on the Canal Zone, the place or places where he or she has resided for the last preceding year, and his or her office or occupation.

The first clause of the foregoing provision is declaratory of the public policy adopted by Congress with respect to the granting of divorces in this jurisdiction. Congress intended that this jurisdiction should not become another Reno; that before a divorce could be obtained here the plaintiff must be a good faith resident of the Canal Zone continuously for the year next preceding the commencement of the action. Such residence being made a prerequisite to the granting of the divorce, it is necessary that the petitioner shall at the very inception of the suit exhibit his residential competency to institute and maintain the action. How may this be done? The second clause of the foregoing provision answers the question by declaring that the plaintiff shall file with the petition his or her own affidavit, stating therein certain things with respect to residence, and the office or occupation of the plaintiff. Our divorce code does not require the petition to be verified. But the clause in question does require that the plaintiff shall file with the petition a sworn statement as to residence, and office or occupation. The purpose of this provision is not for the convenience or benefit of either party to the suit, but for the benefit of society and to prevent fraud upon the court. The provision is mandatory, and a failure to comply therewith prevents the court from acquiring jurisdiction of the action. (See cases above cited.)

The court did not, therefore, acquire jurisdiction of this action because of the failure of the petitioner to file with his petition the affidavit required by the divorce code as to residence and occupation.

It is claimed by the plaintiff, however, that he has alleged his residence sufficiently in his petition, and that such allegation is a substantial compliance with the law, and obviated the necessity of filing such affidavit. There are two complete answers to this contention: (1) The allegation of residence in the petition is not even a substantial compliance with the quoted provisions of the law; (2) the petition is not verified, and it can not, therefore, be treated as an affidavit of residence and occupation. If the petition had contained allegations of the required residential and occupational facts, and had been verified by the petitioner, then such petition might be treated as an affidavit for the purpose of showing such facts, and a separate affidavit with respect thereto would not be required. (*Miller vs. Miller, supra.*) But where the petition is unverified, no matter how fully the residential and occupational facts may be therein stated, the affidavit required by the statute must be filed with the petition or the court acquires no jurisdiction of the action, and any process issued thereon is void.

2. As to the second question. In discussing this question, it will be borne in mind that at the time of the marriage of the parties the plaintiff resided in the Canal Zone and the defendant resided in Panama. Immediately after their marriage in the Canal Zone, in September 1919, they established a home, a matrimonial domicile, in the Republic of Panama, which was there maintained by them until January, 1921, when the parties separated. The defendant has continued to reside in Panama since the separation. Since the marriage she has never at any time resided in the Canal Zone. After the separation the plaintiff abandoned his matrimonial domicile in the Republic of Panama, removed to the Canal Zone, and has since resided here. Under this state of facts, if the plaintiff at the commencement of his action had made a showing by a verified complaint, or by complaint and affidavit, which gave the court jurisdiction of the action, and the summons issued had been personally served upon the defendant in the Canal Zone, the court has no doubt that it could render a valid decree of divorce upon proper proof, notwithstanding the fact that the defendant is a nonresident and has never since the marriage resided in the Canal Zone. Under the circumstances just stated the court would have jurisdiction of the subject matter of the action, and of the parties, and could render a valid decree. But in lieu of personal service of the summons within the territorial jurisdiction of the court, the plaintiff procured service of process by publication on the absent defendant who has not resided here since the marriage. This situation requires consideration of another provision of the divorce code, namely, subdivision 3 of subsection (b) of section 15. In order to procure service of process by publication, this provides that the plaintiff must file an affidavit, stating among other things, "that the

marriage was celebrated in the Canal Zone, and the husband, being petitioner, continues to reside therein and was abandoned by his wife, the defendant, who has gone out of the Canal Zone in disregard of her marital obligations."

This provision seems to the court so plain as scarcely to require construction. Under it, before substituted process is available to the plaintiff in this action, it is incumbent on him to show by his affidavit that after the marriage in the Canal Zone the parties established a matrimonial residence therein; that the plaintiff still continues to reside there; that the wife has abandoned him and gone out of the Canal Zone in disregard of her marital obligations. Not only must this showing be made by plaintiff's affidavit to procure the publication of process but the proof upon the trial must show that the facts alleged in the affidavit are true. Here it is shown that the marriage occurred in the Canal Zone. But the proof shows that the parties never established a matrimonial residence in the Canal Zone, and without the establishment thereof it was impossible for the defendant to abandon the plaintiff and go out of the Canal Zone in disregard of her marital obligation. It is shown that immediately after the marriage they did establish and maintain a matrimonial domicile in the Republic of Panama, so that when immediately after the marriage the plaintiff went out of the Canal Zone she did so in fulfillment of her marital obligations, and not in disregard thereof. Such being the condition of the record, it clearly appears that the affidavit of the plaintiff upon which he secured service of process by publication was false. His proof shows a state of facts which would have precluded him from having process of this court served by publication if those facts had been disclosed by his affidavit. The process of the court was issued and served as the result of a false affidavit, and in a case where such process was not available to the plaintiff. It follows that such service is void, and that by the service thereof the court did not acquire jurisdiction to render a valid decree concluding the defendant.

For the two jurisdictional reasons above given, the plaintiff is denied a divorce, but without prejudice.

EX PARTE PEDRO.

(District Court, Canal Zone, Balboa Division, September 29, 1925.)

Civil No. 728.

1. INTERNATIONAL LAW. COMITY.

Where the Panaman authorities decided to deport the petitioner from Panama to Spain, and requested in writing the Canal Zone police to take and hold him in custody during the night, which the Canal Zone police consented to do, and did, and the next morning redelivered the custody of the petitioner to the

Panaman police, it is held that the custody of the petitioner by the Canal Zone police was an act of comity to the Republic of Panama, and was lawful; that in the absence of treaty or a law of the Canal Zone requiring the Canal Zone police to accept and retain the custody of the petitioner, they had the right to receive or refuse to accept such custody at their pleasure.

2. INTERNATIONAL LAW. COMITY DEFINED.

Comity between nations is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws. Every nation must be the final judge for itself of the nature and extent of the duty and the occasion on which its exercise may be justly demanded.

3. *HABEAS CORPUS*. WHEN AVAILABLE.

Where the Canal Zone police, as an act of comity and in good faith accepted the temporary custody of the petitioner for one night from the Panaman police, and where it appeared that the petitioner had been ordered deported by the Panaman authorities, and where such custody was accepted and at 8.45 the following morning the custody of the petitioner was redelivered to the Panaman police, and the writ of *habeas corpus* was not served until 10.55 a. m. on the same day, it is held that the writ should be discharged.

Attorney for petitioner, *Felix E. Porter*.

Attorney for respondent, *F. Edward Mitchell*, United States District Attorney.

MARTIN, District Judge. This was a *habeas corpus* action, brought to procure the release from custody of the Canal Zone police of one, José Maria Blazquez de Pedro. The petition alleges in substance that the said José Pedro is illegally imprisoned and restrained of his liberty by the Canal Zone police in the police station at Cristobal, Canal Zone; that said Pedro has committed no offense against the laws of the Canal Zone, the United States, or any State, District, or Territory thereof; that he is not imprisoned or restrained by virtue of any writ, order, judgment, or commitment of any judge of the Canal Zone; and that said Pedro is ignorant of and is unable to ascertain the cause of his detention. The petition was duly verified and filed September 25, 1925, and a writ of *habeas corpus* thereupon duly issued returnable September 28, 1925, at 9 o'clock a. m. The marshal's return on the writ shows that the writ was received for service at 10.35 a. m., September 25, 1925, and was served on L. C. Callaway, acting inspector of police of the Canal Zone, at 10.55 a. m. of the same day. September 28, 1925, the acting chief of police of the Canal Zone made and filed a verified return to the writ, alleging inability to produce said Pedro in court for two reasons: (1) Because said Pedro sailed for Spain from the port of Cristobal on board the S. S. *Manuel Calvo* at 10.34 a. m., September 25, 1925, and was not in the custody of the Canal Zone police at the time the writ was served; and (2) that the Canal Zone police had him in custody for safekeeping, upon written

request of the Government of the Republic of Panama, by whom Pedro had been ordered deported, from 8 p. m., September 24, 1925, to 8.45 a. m., on September 25, 1925, at which latter time he was delivered to the Panaman policeman from whom he had been received, and by whom he was thereafter placed on board the S. S. *Manuel Calvo*.

The material allegations of the return were traversed by the petitioner; he alleges that the Canal Zone police placed the petitioner on board the S. S. *Manuel Calvo* and detained him there until the vessel sailed at 11.15 a. m., September 25, 1925, and avers that the Canal Zone police had no authority to imprison and restrain the said Pedro from his liberty in the Canal Zone except pursuant to the extradition agreement between the Republic of Panama and the Government of the Canal Zone made by virtue of the treaty between the United States and the Republic of Panama.

The facts appear to be that, on September 24, 1925, the commandante of the police department of the Republic of Panama made written request to the Canal Zone police to keep Pedro in custody during the night as he was to be put on board the S. S. *Manuel Calvo* early the next morning, because the Government of Panama had decided to deport him. The Canal Zone police acceded to this request; accordingly two Panaman police officers brought Pedro in their custody into and across the Canal Zone to the Balboa Heights railroad station, put him on board a train shortly after 6 p. m., accompanied him across the Isthmus, detrained at Mount Hope, in the Canal Zone, from whence he was taken to the Cristobal police station, where he was delivered into the custody of the Canal Zone police for keeping during the night. He was kept in custody in the Cristobal police station by the Zone police until 8.45 a. m., September 25, 1925, when he was delivered to the Panaman police officers who had brought him there. These two Panaman policeman, with Pedro in custody, went to the port of Cristobal, C. Z., where the S. S. *Manuel Calvo* was lying, placed Pedro on board and detained him on board until said vessel sailed. Lieutenant Kallay and first class policeman Dietrick, of the Canal Zone police force, accompanied them from the Cristobal police station to the vessel. Kallay and Dietrick did not have the custody of Pedro, but accompanied the party to prevent any disturbance of the peace, and to render assistance if required by the Panaman officers. They remained at the vessel until it sailed. It was shown quite conclusively (counsel for petitioner conceding in argument) that the vessel left the dock at Cristobal at 10.34 a. m. The writ was not served until 10.55 a. m., 21 minutes after the vessel sailed. It is shown that customarily, when a person in the custody of the police of the Canal Zone is being transported

through Panaman territory, a Panaman policeman accompanies them, and when the Panaman police transport a person in their custody through the Canal Zone, the Canal Zone police accompany them. It thus appears that the Canal Zone police, in keeping the said Pedro during the night of September 24th, and in accompanying the Panaman police and Pedro to the vessel, acted in good faith and in a spirit of cooperation and in pursuance of the friendly relations between the governments of the two jurisdictions. The proof clearly shows that the Canal Zone police did not have the custody of Pedro after 8.45 a. m., on September 25, 1925.

The return of the respondent is in substantial compliance with the provisions of subdivision 3 of section 573 of the Code of Civil Procedure. The only question then for determination is this: Did the police department of the Canal Zone have the authority to receive Pedro from the Panaman police, keep him during the night, and transfer him to the Panaman police on the following morning? There is no law in the Canal Zone, nor does any treaty exist, requiring the police force of the Canal Zone to take charge of and keep temporarily or otherwise a person sought to be deported by the Panaman Government. Their right so to do, if it exists, must be found in the principles of the comity of nations. The general rule with respect to this matter is, that there is no well-defined obligation on one country, except in its discretion, to aid and assist another country to carry into effect that country's laws, judgments, or executive orders. This rule has been applied in extradition cases where, in the absence of treaty, nations have surrendered fugitives from justice by reason of the comity which existed between them. (*U. S. vs. Rauscher*, 119 U. S., 407.)

Comity between nations is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. (*Hilton vs. Guyot*, 159 U. S., 113 at 164; *Diez vs. Schuber*, 3 C. Z., Rep. 17, 57.)

Mr. Justice Story, in his "Conflict of Laws," sections 33-38, lays down the rule that: "It has been thought by some jurists that the term 'Comity' is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy as a matter of paramount moral duty. Now, assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." This statement of the doctrine by Story is quoted and approved in the case of *Hilton vs. Guyot*, *supra*.

Tested by these rules, the act of the Canal Zone police department in accepting the custody of Pedro was a mere act of comity, the performance of a moral duty to a sister nation, with whom we are on friendly terms. It was an act which the Canal Zone police could perform or refuse to perform at its pleasure. It chose to perform it upon the request of the Panaman Government, and having so chosen, its acts in the premises were lawful.

It is contended by counsel for the petitioner in argument, however, that the action of the Panaman authorities in deciding to deport Pedro was unlawful, and that he was practically railroaded out of the Republic of Panama. This question the Court can not entertain nor decide, for the reason that the pleadings of the petitioner present no issue which would warrant the court in investigating or determining that question.

This case is not one of extradition and does not fall within the terms of the Treaty of Extradition between the United States and Panama. It follows that the writ must be discharged.

GOVERNMENT *versus* FLANNERY AND LORENZ.

(District Court, Canal Zone, Cristobal Division, October 14, 1925.)

Criminal No. 1569.

1. CANAL ZONE. POLICEMAN. PEACE OFFICERS. PUBLIC OFFICERS.

Canal Zone policemen are peace officers as that term is used in the codes; and "public officers," as that term is used in Sec. 123 of the Penal Code.

2. ARREST. WHEN WITHOUT WARRANT.

A peace officer may arrest without a warrant where such person is in the act of committing a crime in the view and presence of such peace officer, and to his knowledge.

3. SEARCH WARRANT. SEARCH AND SEIZURE WITHOUT.

If a peace officer has reasonable ground to believe that a water craft in Canal Zone waters has contraband intoxicating liquors on board, he may board and search the same, seize the contraband liquors, and arrest the person in charge thereof, without a warrant, under the authority of Sec. 26, Title II of the National Prohibition Act.

4. NAVY. SEARCH OF NAVY BOAT.

Under the provisions of the National Prohibition Act in force in the Canal Zone, a peace officer who sees intoxicating liquor being possessed and transported unlawfully on a Navy boat, in Canal Zone waters, may board the same, seize the contraband liquors, and arrest the person in charge thereof, where such boat is being used by Navy officers, dressed in civilian clothes, and by others for a picnic party.

5. NAVY. SECRETARY OF THE NAVY. REGULATIONS.

The Secretary of the Navy, with the approval of the President, may not, under R. S. 1547, make a regulation exempting a Navy vessel from proper search by peace officers acting under the provisions of Sec. 26, Title II, of the National Prohibition Act.

6. ARREST; RESISTING, OBSTRUCTING, AND DELAYING A PEACE OFFICER IN MAKING.

Where a peace officer of the Canal Zone undertakes to board a Navy boat wherein he sees contraband liquor, to seize the liquor and arrest the one in charge of the boat, and the officer's efforts to arrest such person is willfully resisted, obstructed, and delayed, such person so acting is criminally responsible for his acts under Sec. 123 of the Penal Code, even though he be a Navy officer.

Criminal action for willfully resisting, obstructing, and delaying a peace officer in the performance of his duty of making an arrest.

For plaintiff, *F. Edward Mitchell*, District Attorney, *J. J. McGuigan*, Assistant District Attorney.

Attorneys for defendants, *Fairman* and *Shook*.

MARTIN, District Judge. An information was filed herein October 8, 1925, charging that the defendants did on October 4, 1925, in the Cristobal Division of the Canal Zone, willfully obstruct, delay, and resist Lieutenant Foley, of the Canal Zone Police, then lawfully discharging and attempting to discharge his duty to arrest the defendant, Lorenz. Pleas of not guilty were entered, and a jury was empanelled to try the case. The Government introduced its evidence and rested. The defendants filed a motion to direct the jury to return a verdict in their favor on the ground that under R. S. 1547, and Arts. 845, 846, and 1323 of the Navy Regulations, promulgated in 1920 by the Secretary of the Navy with the approval of the President, Lieutenant Foley had no authority to arrest the defendant, Lorenz, because he was at the time on board of and in command of a Navy vessel.

The facts shown by the Government's evidence may be shortly stated: About 12.15 p. m., on October 4, 1925, the police boat used for patrolling Cristobal Harbor, in the Canal Zone, was cruising in the harbor, with first class policeman Aubert, Thomas Foley, Lieutenant of the Zone Police, and engineer Challery on board. Aubert discovered the Navy launch in question, called Lieutenant Foley's attention to it, and the police launch thereupon steered a course for the Navy launch, coming alongside of the latter shortly thereafter in waters within the Canal Zone. The defendant, Lorenz, a lieutenant in the U. S. Navy and stationed on shore duty at Coco Solo, a Navy shore station in the Canal Zone, was in charge of the Navy launch. On the launch were Lieutenant Flannery, a member of the Air Force of the United States stationed at France Field, in the Canal Zone, and other Navy and Air Force officers, a number of women, and two civilians, numbering 30 or more. The defendants, and all the other Navy and Air Force officers were in civilian clothes. The Navy launch was proceeding westwardly, across the waters of Cristobal Harbor. When the police launch arrived in the vicinity of the Navy launch, the police officers observed persons on board the Navy launch

carrying articles to, and depositing them in a place near the stern of the Navy launch. As the police launch neared the Navy launch, the officers on board the police launch discovered two kegs of beer on board the Navy launch. When the police launch drew alongside the Navy launch, Lieutenant Foley, who was also in citizens clothes, learned that Lieutenant Lorenz was in charge of the Navy launch, introduced himself as Lieutenant Foley, of the Canal Zone police, and demanded the surrender to him of the kegs of beer, informed Lieutenant Lorenz that he was under arrest, and requested said defendant to accompany him. The defendant, Lorenz, declined to submit to arrest or to accompany Lieutenant Foley, and declined to surrender to the latter the beer on board the Navy launch, which was being transported in said launch across the waters of Cristobal Harbor. Lieutenant Foley then undertook to take the defendant, Lorenz, into custody when Lorenz, Flannery and others on board prevented him from so doing. Defendant Flannery, disconnected the hose which had been attached to one keg of beer and threw it overboard, and the defendant, Flannery, or some others of the party threw the other two kegs of beer overboard, the officers finding, on boarding the Navy cutter, that there were three kegs of beer thereon. It also appeared that during the *mêlée* which occurred on board the Navy cutter when Lieutenant Foley was undertaking to arrest the defendants and seize the beer, that one of the men on board the cutter was about to strike Lieutenant Foley from behind when policeman Aubert drew his pistol. When a woman in the Navy launch informed those on board thereof, that Aubert had drawn a pistol, this party desisted from his attempt to strike Lieutenant Foley. Thereupon Lieutenant Foley directed policeman Aubert with the police launch to pick up two kegs of beer which were still floating, and while this was being done the engine of the Navy launch was started and the launch, with Lieutenant Foley on board, proceeded to Coco Solo, the home base of the Navy cutter, Lieutenant Foley accompanying the Navy cutter under protest. The beer in question admittedly contained in excess of 3 per cent of alcohol by volume. The evidence of the Government quite clearly shows that the party on board the Navy launch was a picnic party.

It is the contention of the defendants, by a motion filed, and by the arguments submitted in support thereof, that the Navy cutter in question, being admittedly a vessel belonging to the United States Navy, was exempt from search by Lieutenant Foley; that he had no right to board the same: that he had no right to seize the beer thereon; that he had no right to arrest the defendant, Lorenz, and take him into custody from the Navy cutter because of the provisions of R. S., section 1547, and the regulations of the Secretary of the Navy, approved by the President, Arts. 845, 846, and 1323.

Before passing on the issue raised by said motion, it is advisable to state briefly the status of the civil authorities in the Canal Zone. The Panama Canal Act provides for a civil government therein, makes the Governor the executive thereof, provides for a district court, a marshal, a district attorney, magistrates' courts, and constables. Section 2 of the Act ratifies the previous laws, rules, and regulations for the creation of the police force (E. O. 24; sections 48 *et seq.* of Act No. 8, L. C. Z., page 77) and the Executive Order of April 16, 1910 (E. O., 97), declaring policemen to be peace officers. By such ratification, the laws, rules, and regulations so ratified were given express Congressional sanction and have the force and effect of Congressional enactments. (*McConaughey vs. Morrow*, 263 U. S., 39.) With like Congressional sanction, it is provided in section 109 of the Code of Criminal Procedure (L. C. Z., 189) that a peace officer may, without a warrant, arrest a person "for a public offense committed or attempted in his presence." A police officer is a "public officer" as those words are used in section 123 of the Penal Code under which this prosecution is proceeding. (L. C. Z., 111.) Under section 4 of the Panama Canal Act, the members of the police force are employed by the Governor of The Panama Canal; and the police department is one of the arms of the executive employed in the Government of the Canal Zone.

By section 3 of the Act of Congress, approved November 23, 1921 (42 Stat., 222), it is provided that said act "and the National Prohibition Act (41 Stat., 305), shall apply not only to the United States but to all territory subject to its jurisdiction." The Canal Zone is territory under the jurisdiction of the United States within the meaning of that section. Section 20, Title III of National Prohibition Act is applicable exclusively to the Canal Zone. That section, briefly stated, makes it unlawful for any person to have in his possession or under his control any intoxicating liquor of any kind except for certain designated purposes. It is not even suggested that the defendants or either of them lawfully had the possession of or was lawfully transporting the beer in question. Section 3 of Title II of the National Prohibition Act makes it unlawful to possess any intoxicating liquor at the time in question for beverage purposes; and the evidence shows that at the time in question, the beer was on the Navy cutter for that purpose. Section 26 of title II of the National Prohibition Act provides in substance that when "any officer of the law" shall discover any person in the act of transporting intoxicating liquor in violation of law in any "water craft" it shall be his duty to seize such liquors, take possession of such "water craft," and arrest any person in charge thereof. Such seizure is lawful without a warrant if the officer knows or has reasonable ground to believe that liquor is being unlawfully possessed or transported. (*Carrell vs. U. S.* 267 U. S., 132.) It was

therefore, the plain duty of Lieutenant Foley, when he discovered the Navy cutter in question in Canal Zone waters in charge of the defendant, Lorenz, and with intoxicating liquors unlawfully on board and being unlawfully transported therein, to seize the liquors, arrest Lorenz and take him before a magistrate and prosecute him for the violation of the law unless the contention of the defendants is good. This duty was imposed not only by the National Prohibition Act in force in the Canal Zone but by the laws of the Canal Zone herein referred to; for it is the duty of the Governor of The Panama Canal and those appointed by him for that purpose, to govern the Canal Zone by the enforcement of all laws in force therein as contained in the Code and Executive Orders of the Canal Zone, the Panama Canal Act and the amendments thereto, and such Congressional enactments as have been made applicable to the Canal Zone, including the National Prohibition Act.

Inquiry will now be made of the legal issue raised by the defendants' motion. It is provided in R. S., section 1547, that:

The orders, regulations and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he since may have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner. (Act of July 14, 1862, 12 Stat., 565.)

It has been held by the Supreme Court of the United States, that regulations adopted pursuant to this statute have the force of law. *Gratiot vs. United States*, 4 How. U. S., 80, and *Ex Parte Red*, 100 U. S., 22. In those cases there was no direct conflict between such a regulation and a statute of the United States. But in the later case of *United States vs. Symonds*, 120 U. S., 46, such conflict was directly involved. There the statute passed by Congress had defined what constituted "sea service" and fixed compensation therefor. The Secretary of the Navy, by order, sought to give a construction of the words "sea service," which would change the status of Symonds and affect his compensation. In holding that the order of the Secretary in that case was in conflict with statute, the Supreme Court said:

But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was, in fact, sea service, or to increase his compensation by declaring that to be sea service which was, in fact, shore service. The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot vs. United States*, 4 How., 80, and *Ex parte Reed*, 100 U. S., 13, upon which the Government relies. In neither case was it held that such regulations, when in conflict with the Acts of Congress, could be upheld.

And no decision has been rendered by that court since which in any way conflicts with, modifies, or overrules this decision with respect to the matter there decided.

In 1880, a question arose between the disbursing officer of a Navy vessel and the Treasury Department with respect to the validity of the act of such disbursing officer in making payment, under the Navy regulations, of money due a deceased member of the crew of the vessel to the administrator of the estate of the deceased. The controversy was submitted by the Secretary of the Navy to the Attorney General of the United States who gave his opinion thereon. (16 Op. Atty. Gen., 494.) After citing R. S., section 1547 and the applicable regulations involved in the controversy, the Attorney General said:

It would be going too far to hold that because the Secretary of the Navy, with the approval of the President, has a *quasi* legislative power in prescribing the mode in which the subordinates of the naval department shall perform their duties, and the rules by which they should be governed, he could also prescribe a rule which would control the action of the accounting officers upon the same subject. It must be deemed that the rules thus prescribed are for the government of those persons in the Navy whom they may immediately affect. They can not limit or alter the rights of others who are not amenable to them. While in general terms it is often said that the Army and Navy regulations have the force and effect of law, this can only be properly so where we are dealing with a person or subject matter over which the Secretary has official control. In *Gratiot vs. United States* (4. How., 117) there is an expression similar to that I have suggested, used by Mr. Justice Wayne; but he is dealing with the case of Gen. Gratiot, an officer clearly subject to the Army regulations. Nor do I understand that it can be said, that the fact that Congress has adopted the regulations gives them the force of law in the general sense. It gives them the force of law only so far as they assume to control those to whom the regulations were applicable. Were it otherwise, it would be necessary to hold that inasmuch as the Secretary, with the authority of the President, has a right to alter those regulations, Congress has parted with its legislative power so far as the Navy is concerned and has conferred it upon the Secretary of the Navy. That which it has conferred upon the Secretary of the Navy is not any portion of its general power of legislation, but only the right to make appropriate regulations for the performance of their duties by those whom Congress has placed under his official control.

And then the final opinion is given that the Navy regulations are to be construed as binding only upon the officers and seamen of the Navy and not upon the accounting officers of the Treasury Department.

It was held by the same court in the case of *United States vs. Eaton*, 144 U. S., 677, that where the Commissioner of Internal Revenue had been given authority to make regulations to carry into effect an act imposing a tax upon and regulating the manufacture and sale, importation and exportation of oleomargarine, which contained several sections forbidding particular acts and imposing penalties for a violation thereof, and where the commissioner had made a regulation that any person doing an act therein prescribed (not one named in the act

itself) should be liable to the penalties prescribed in the act, that such regulation was void; that the Commissioner had no power or authority to declare that a crime which had not been so declared by the act itself. And this rule was followed in the case of *In re Kollock*, 165 U. S., 526.

It was held by the same court in *Lynch vs. Tilden Co.*, 265 U. S., 315, that the Treasury Department, which had been empowered by Act of Congress relating to adulterated butter, to make regulations for carrying the act into effect, could not lawfully adopt a regulation which eliminates conditions, words, and phrases used in the act in defining "adulterated butter," and substituting others in lieu thereof.

A regulation of a department of the Government under a law authorizing the same, must be in pursuance of such law upon a subject matter which the law has not determined, adjusted, or defined; and must be in conformity to law, when a law exists upon the subject matter of the regulation.

21 Op. Atty.-Gen., 46.

U. S. *vs.* Atlantic Journal Co., 210 Fed., 275.

What then are the powers of the Secretary of the Navy, with the approval of the President, with respect to the present controversy? May he make a regulation which will preclude the police from boarding a Navy cutter found on waters within the Canal Zone, which, to the knowledge of the police, and in their view, has intoxicating liquor aboard contrary to law, and from seizing such liquor and arresting the person in charge of the cutter? May he adopt a regulation which exempts a number of the Navy personnel from arrest and prosecution for a violation of the National Prohibition Act made pursuant to the Eighteenth Amendment to the Constitution, and which act has been held to be constitutional by the highest court of the land? To so hold would be to say that under R. S. section 1547, the Secretary of the Navy, with the approval of the President, has legislative authority to repeal or make nugatory a provision of the Constitution and a law adopted by Congress in pursuance thereof so far as the Navy personnel and equipment is concerned. To so hold would remove the Navy, while within the jurisdiction of the civil authorities in the United States and territory subject to its jurisdiction, from the operation of the Constitution of our country and its laws passed by Congress, and from the penalties there imposed, and leave the personnel of the Navy subject only to such punishment as the regulations of the Navy provide. Certainly no such result could have been in the contemplation of Congress when it enacted the National Prohibition Act; for, if it had, then appropriate language would have been used to exempt the Navy from the operation of the law. No such exemption appears therein. It must therefore be presumed that no such exemption was

intended. If there is any naval regulation in existence having such force and effect as contended by the defendants, it must give way to the Constitution and laws of the land in conflict therewith.

Is there such regulation? The court has been cited to none which, properly construed, may be given any such force and effect.

Article 845 of the Navy Regulations, distinctly relates to and is applicable only to a case where a representative of a foreign state seeks to board a Navy vessel or take some one of the Navy personnel from such vessel, and in such case, that force may be repelled with force. Clearly, this article is not applicable here. The Canal Zone is not a foreign state. It is under the sovereignty of the United States; it is territory under the jurisdiction thereof; and is governed by virtue of laws ratified or enacted by the Congress of the United States. It is an absurdity to contend that this is a foreign state in this controversy. The article in question is not applicable.

The provisions of article 846 are in similar circumstance. The provisions of section 1 thereof are applicable only when the Navy vessel is "in ports where war or insurrection exists or threatens." Such provisions are not applicable under the facts of this case. Section 2 of the article relates to the rights, privileges, and comity of nations as applied to the boats of a ship of war. It relates to rights under international law which has no application here, for the Canal Zone is not a foreign nation.

Article 1323 is the recreation provision of the Navy regulations. It provides for the encouragement of the men of the Navy to engage in athletics, fencing, boxing, boating, and other similar sports and exercises, and in appropriate weather, swimming. By what stretch of the imagination can these provisions be held to include a picnic party with beer for the principal beverage, even though the party was being conveyed by boat? The article does not apply here.

It may be thought, although such claim is not made, that this case is governed by the provisions of section 12 of the Act of Congress of May 18, 1917 (40 Stat., 82), commonly known as "The Selective Service Draft Act," which section was made applicable to the Navy by the Act of Congress approved October 6, 1917. (40 Stat., 393.) This section authorizes the President to make such regulations governing the prohibition of alcoholic liquors in or near military or naval camps or of sale thereof to the officers and enlisted men of the Army and Navy, as he may from time to time deem necessary or advisable, provided, that no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spiritous liquors at any military station, etc., or such places under naval jurisdiction as the President may prescribe. Said section further provides, "Any person, corporation, partnership, or association violating the provisions of this section or regulations made thereunder

shall, *unless otherwise punishable under the articles for the Government of the Navy*, be deemed guilty of a misdemeanor and be punished by a fine of not more than one thousand dollars, or imprisonment of not more than 12 months, or both." The Eighteenth Amendment of the Constitution of the United States was ratified by the requisite number of States, January 29, 1919. By its terms it became effective 1 year from the ratification thereof, to wit, January 29, 1920. October 28, 1919, Congress passed the National Prohibition Act (41 Stat., 305), which, for the purposes of this case, took effect January 29, 1920. Section 7, Title I, of the National Prohibition Act, provides, among other things, that the provisions thereof shall not "be construed to prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law prohibiting the manufacture, use, possession, sale, or other disposition of intoxicating liquors during the period of the war and demobilization thereafter." By joint resolution of the two houses of Congress, adopted March 3, 1921 (41 Stat., 1359), all of the emergency war-time legislation except certain acts therein specified, were repealed. The Attorney General of the United States, in an opinion dated April 11, 1921, given at the request of the Secretary of the Navy, held that such joint resolution repealed, among other war-time legislation, the provisions of the above Act of Congress of October 6, 1917. (32 Op. Atty.-Gen., 505 at 510.)

A treaty of peace was signed between Germany and the United States in August, 1921. It was duly ratified and such ratification was proclaimed by the President November 14, 1921. A treaty of peace between the United States and Austria was negotiated in August, 1921, was duly ratified and such ratification was proclaimed by the President November 17, 1921. A like treaty was made between the United States and Hungary in August, 1921, was duly ratified and such ratification was proclaimed by the President December 20, 1921. Under such treaties the period of the war between the United States and Germany, Austria, and Hungary, was finally and legally terminated. Demobilization of the personnel of the Army and Navy engaged in such war has long since taken place. It follows, therefore, under the resolution of Congress of March 3, 1921, and under the provisions of section 7 of Title I, of the National Prohibition Act, on the termination of the war by such treaties, and the demobilization of the Army and Navy personnel engaged therein, section 12 of the Act of Congress, approved May 18, 1917, and the Act of October 6, 1917, making said section 12 applicable to the Navy, have long since ceased to have any further force or effect. This case, therefore, is to be determined by the provisions of the National Prohibition Act and the local laws applicable thereto.

The court reaches the conclusion that the Secretary of the Navy has no power or authority under the provisions of R. S., section 1547, with the approval of the President, to adopt any regulation which, under the facts here presented, exempts a Navy cutter, in Canal Zone waters, from being boarded by a policeman of the Canal Zone, where such policeman sees intoxicating liquor aboard, or which will prevent such policeman from seizing such contraband liquor and arresting the person in charge of such vessel, and that the Navy Regulations cited by the defendants do not justify their contention in this case. It appearing that such policeman was willfully resisted, obstructed, and delayed by the defendants in the performance of his duty, the motion must be denied. Let such order be entered.

NAVY REGULATIONS ISSUED 1920.

ARTICLE 845. The Commanding Officer shall not permit any ship of the Navy under his command to be searched by any person representing a foreign state, nor any of the officers or crew to be taken out of her, so long as he has the power to resist. If force is used it must be repelled.

ARTICLE 846. (1) In ports where war or insurrection exists or threatens, a commanding officer of a ship shall always require the boats away from the ship to have some competent person in charge and shall see that the proper steps are taken to make their naval character evident at all times.

(2) The boats of a ship of war shall be regarded in all matters concerning the rights, privileges and comity of nations as parts of the ship herself.

ARTICLE 1323. (1) The commanding officer shall encourage the men to engage in athletics, fencing, boxing, boating, and other similar sports and exercises. Gymnastic outfits will be furnished by the department to vessels requesting them. When the weather and other circumstances permit, he shall establish in the routine of exercises and drills a regular period for swimming, such exercise to include every enlisted person on board except those excused by the surgeon.

(2) During the boat races the use of whistles or sirens shall not be permitted as an encouragement to the contestants; the whistle of the referee's launch may, however, be used to indicate which boat is leading.

(3) The executive officer shall regulate the bumboats and all traffic alongside or on board and be watchful that no unauthorized articles for the crew, unwholesome fruit or food, or improper articles are introduced on board.

(4) He shall, with the approval of the commanding officer, regulate the prices that the barber, tailor, and shoemaker and other men performing services for the crew, shall be permitted to charge, bearing in mind that the charges should be moderate as the men are already paid for their services.

GENERAL PETROLEUM CORPORATION *versus* S. S. "DAVID," ET AL.

(District Court, Canal Zone, Balboa Division, October 22, 1925.)

Admiralty No. 727.

1. CANAL ZONE. HOW CREATED.

The Canal Zone was created by grant from Panama to the United States by treaty of November 18, 1903, and by express provision of section 1 of the Panama Canal Act.

2. CANAL ZONE. EXTENDED.

The Boundary Convention between the two Governments of September 2, 1914, extended the Canal Zone at the southerly end thereof to include the Harbor of Ancon and 3 marine miles from mean low water mark, and when so extended such waters became a part of the Canal Zone.

3. CANAL ZONE. SOUTHERLY BOUNDARY. HOW DETERMINED.

Under the treaty, the Boundary Convention, and the Panama Canal Act, the northeasterly boundary of Ancon Harbor is fixed by a line running from mean low water mark at Panama southeasterly on the course given therein for 3 marine miles; the southwesterly boundary is fixed by extension of the westerly boundary of the Canal Zone from mean low water mark, parallel with the main channel of the Panama Canal for 3 marine miles, and by measurements of 3 marine miles from projecting points of land above mean low water mark between such northeasterly and southwesterly boundaries and connecting the exterior points 3 marine miles from such shore points by straight lines from point to point. All buoys, ports, harbors, and inland waters are to be excluded in fixing such boundaries.

4. DISTRICT COURT. TERRITORIAL JURISDICTION.

The territorial jurisdiction of the District Court is coextensive with the boundaries of the Canal Zone, and as the boundary lines thereof are extended to that extent the territorial jurisdiction of the court is expanded.

5. PROCESS. RETURN. SET ASIDE. PROOF REQUIRED.

The return of the marshal that the vessel in controversy was arrested in Canal Zone waters is *prima facie* true, and to set it aside as false the proof of falsity must be clear and satisfactory; held in this case that the proof is insufficient. Admiralty proceeding in *rem*. Exceptions (treated as a motion) to set aside the return of the marshal on ground that the steamship *David* was seized outside the territorial jurisdiction of the court.

Proctors for claimant, *L. S. Carrington* and *Carlos Icaza*.

Proctor for libellant, *Felix E. Porter*.

MARTIN, District Judge. September 16, 1925, the libellant filed its libel herein for damages in the sum of \$16,149.70, resulting from a collision between the *Yorba Linda*, a vessel owned by libellant, and the steamship *David*, a vessel owned by the respondent, which occurred on the high seas. Monition duly issued on the same date, and the marshal's return thereon, filed September 23, 1925, shows that the *David* was arrested on September 18, 1925, in Canal Zone waters, and within the jurisdiction of the court. After giving stipulation for the release of the vessel, the respondent, on October 1, 1925, filed herein an exception to the marshal's return, and to the jurisdiction of the court over the res, upon the ground that the *David* at the time of her arrest was outside the territorial limits of the Canal Zone, and on the high seas, and this presents the question for determination in this case.

For the sake of brevity, the steamship *David* will hereafter be referred to as the *David*; the U. S. Marshal will be referred to as the "Marshal;" the Chief Deputy U. S. Marshal will be referred to as the

"Deputy Marshal;" the plat identified and offered in evidence as "Claimant's Exhibit No. 1" will be referred to as the "plat."

Testimony was introduced on the part of the claimant to show that when arrested the *David* was outside of the territorial limits of the Canal Zone and was at the point marked on the plat by a straight mark across the course of said vessel, indicated by the letters JTL-S, nearly half way between San Jose Rock and Taboga Island. The testimony of the claimant shows that the *David* left the buoy in Panama Bay, indicated on the plat by the letters and figures Dp-1-JTL, and proceeded on a course just inside of San José Rock; that after passing the rock the course was changed at the point marked on the plat JTL-2; that she then proceeded on a course just inside of San José Rock; that after passing the rock the course was changed at the point marked on the plat JTL-2; that she then proceeded on a course to the point marked on the plat JTL-C; that she then proceeded in a straight line on a course toward the eastern end of Taboga Bay at Taboga Island until she was arrested by the marshal at point JTL-S. After the arrest of the *David*, as shown by the claimant's evidence, she started back in the direction of Flamenco Island, and when just outside the buoy marked on the plat "BS" and "QCS" she met the motor ship *Aurora*, proceeding in the direction of Taboga; that the *Aurora* was hailed and took the passengers off the *David* and proceeded on her way to Taboga. The captain of the *Aurora* locates the point where he took off the passengers just outside the buoy last above referred to. Captain Lund, of the *David*, says that the *David* then proceeded to a point near Flamenco Island, on the westerly side thereof, and anchored. Later a pilot came on board and the *David* was brought into Balboa Harbor.

The libellant's testimony tends to show that the *David* passed through between Flamenco Island and San José Rock a short distance, when the *David* was arrested by the marshal, the point being indicated on the map by the deputy marshal with an outline representing a ship, marked FTH, and the point indicated by the marshal being a cross "x" with the initials IML. The colored engineer on board the boat used by the marshal locates the *David* at the time of her arrest about 300 yards from buoy No. 1, which buoy is indicated on the plat by the initials GF and by the printed designation FIW-"1."

The first question for determination is: Where is the southern boundary line of the Canal Zone. This is to be determined from the treaty between the United States and the Republic of Panama of November 18, 1903, ratified by the two Governments, and proclaimed to be in effect February 26, 1904, the Boundary Convention between said two Governments of September 2, 1914, and ratified and proclaimed February 18, 1915, and from the facts and circumstances proven with respect to the boundary as shown by the plat. The territorial jurisdic-

tion of the court is to be determined from such matters and from the Panama Canal Act and the amendment thereto approved September 21, 1922.

Article 2 of the treaty referred to provides that:

The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of the zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said Canal (the Panama Canal) of the width of 10 miles extending to a distance of 5 miles on each side of the center line of the route of the Canal to be constructed; the said Canal beginning in the Caribbean Sea, 3 marine miles from mean low water mark, and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of 3 marine miles from mean low water mark, *with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the Zone, above described shall not be included within this grant.* * * * The Republic of Panama further grants in like manner to the United States in perpetuity all islands within the limits of the zone above described, and in addition thereto the group of small islands in the Bay of Panama, named Perico, Naos, Culebra, and Flamenco.

And article 3 of the treaty grants to the United States sovereignty of the territory within which said lands and waters are located, to the entire exclusion of the sovereignty of the Republic of Panama. Under the provisions of article 2 of the treaty, the Republic of Panama retained sovereignty over the waters of that which will be hereafter referred to as the "Harbor of Ancon," and sometimes referred to as the "Harbor of Balboa."

August 24, 1912, the Congress of the United States enacted what is known as the "Panama Canal Act" (37 Stat., 567; T. & A., 79). In section 1 thereof it is declared:

* * * that the zone of land and land under water of the width of 10 miles, extending to the distance of 5 miles on each side of the center line of the route of the Canal now being constructed thereon, which zone begins in the Caribbean sea 3 marine miles from mean low water mark and extends to and across the Isthmus of Panama into the Pacific Ocean to a distance of 3 marine miles from mean low water mark, *excluding therefrom the cities of Panama and Colon and their adjacent harbors located within said Zone, as excepted in the treaty with the Republic of Panama dated November 18, 1903, but including all islands within said described zone, and in addition thereto the group of islands in the Bay of Panama named Perico, Naos, Culebra, and Flamenco, and any lands and water outside of said limits above described which are necessary or convenient or from time to time may become necessary or convenient for the construction, maintenance, operation, sanitation, or protection of said Canal, or of any auxiliary canals, lakes, or other works necessary or convenient for the construction, maintenance, operation, sanitation, or protection of said Canal* * * * *shall be known and designated as the Canal Zone.* The President is authorized by a treaty with the Republic of Panama to acquire any additional land or land under water not already granted, or which was excepted from the grant, that he may deem necessary for the operation, maintenance, sanitation, or protection of the Panama Canal * * * which additional land or land under water so acquired shall become part of the Canal Zone.

Section 4 of said act provides, among other things, *for the government of the Canal Zone*, and makes the Governor of The Panama Canal the

executive of such government. Section 8 of said act provides "*that there shall be in the Canal Zone one district court * * * ; and one district judge of said district * * * .*" The section further provides that the *district court shall have original jurisdiction of certain classes of cases, among them, admiralty cases, and that such admiralty jurisdiction shall be the same as that exercised by the United States district judges and the United States district courts.* By the terms of this act, the territorial jurisdiction of this court at the southerly end of the Canal Zone, extended only to mean low water mark and islands in Panama Bay named in the act.

Pursuant to the authority conferred upon the President by Sec. 1 of the Panama Canal Act, the President entered into a boundary convention with the Republic of Panama on the second day of September, 1914, which was ratified and proclaimed February 18, 1915. Article 4 of such boundary agreement provided in substance that the harbor of the city of Panama shall include the maritime waters in front of the city of Panama lying to the north and east of a line beginning at a concrete monument set on Punta Mala and running south 72 degrees and 14 minutes east through the middle island of the three islands known as Las Tres Hermanas (the Three Sisters), but excluding the said middle island *and extending 3 marine miles from mean low water mark at Punta Mala*; and that the harbor of Ancon shall include the waters lying south and west of said line. The line in question is shown on the plat beginning at low water mark near Punta Mala and extending on a course stated in the boundary agreement, to the point marked on the plat with an "x" and the letters R-CS. Both sides in this controversy concede that such line constitutes the northeasterly boundary line of Ancon Harbor, and that waters southwesterly thereof are in Ancon Harbor. When the Republic of Panama entered into this boundary agreement with the United States, it released and relinquished all claim to sovereignty over the waters of Ancon Harbor, and such waters thereby came under the jurisdiction of the United States and became a part of the Canal Zone, and by virtue thereof the jurisdiction of the District Court of the Canal Zone was extended over such waters between a line from Punta Mala extending southeasterly to the point on the plat marked R-CS forming the northeastern boundary, and a line extending from a point at mean low water mark marked "P" on the plat, near the boundary monument where the westerly boundary of the Canal Zone touches the shore, to the point marked I-CS on the plat, as the southwesterly boundary, and southerly between such boundaries 3 marine miles from mean low water mark. When the southerly boundary is ascertained, then the territorial limits of the jurisdiction of this court is fixed as to these waters. When the Panama Canal Act gave the District Court of the Canal Zone jurisdiction over

the Canal Zone, and when thereafter the boundary lines of the Canal Zone were fixed as above indicated, such jurisdiction was extended with the extension of the boundary lines of the Canal Zone. (In re. Manufacturing Co., 108 U. S., 401.) It is not necessary, however, to rely upon such rule in this case, because the Congress of the United States, by the Act of September 21, 1922, confirmed the jurisdiction of the District Court over the Canal Zone in accordance with the boundaries then existing.

The jurisdiction over territorial waters is a question primarily for the law-making power. The action creating such jurisdiction is legislative and not judicial.

The Kodiak, 53 Fed., 126.

Manchester vs. Mass., 139 U. S., 240.

Humboldt, etc., Co. vs. Christeferson, 73 Fed., 239.

Cunard, etc., vs. Mellon, 262 U. S., 100 at 122.

In the latter case the Supreme Court of the United States declares the settled law with respect to this case in the following language:

It is now settled in the United States and recognized elsewhere, that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles.

There can, therefore, be no question about the jurisdiction of this court extending to the exterior lines of the Canal Zone as fixed and defined by the treaty between the United States and Panama, the Boundary Convention, the Panama Canal Act and the amendment thereto, and that the southerly line thereof extends out 3 marine miles from mean low water mark.

What then is the southern boundary line of the Canal Zone, and how shall it be determined? As above stated, the northeasterly and the southwesterly boundaries for 3 miles out are conceded by the parties to be as shown upon the plat, and the Court finds that those are such boundaries. Manifestly, in view of the rule announced in *Cunard vs. Mellon*, and the cases cited therein, the bays and inlets must be excluded from consideration in determining mean low water mark between the northeasterly boundary and the southwesterly boundary. The claimant concedes that in order to fix this boundary it is proper to run a line parallel with the Panama Canal channel from Batelle Point, shown on the plat, 3 marine miles outward and ending at the point marked V-CS, and the claimant contends that a line drawn from the 3-mile limit at the point marked I-CS to the point marked V-CS and thence to the point marked R-CS, constitutes the southerly boundary of the Canal Zone. If the procedure indicated by claimant's concession in this respect is correct, and the court holds that it is, then it is proper to extend a line 3 marine miles outward from any other pro-

jecting point on such coast line at mean low water mark and thus determine the southerly boundary of the Canal Zone. The Court has taken the liberty of placing upon the map a line from Bruja Point outwardly for 3 marine miles parallel with the Panama Canal channel to the point marked with the letter "K." It is established by the evidence that Pulperia Reef extends outwardly at mean low water to a point near Changarmi Island, and Captain Svenson, one of the witnesses, indicated the extent of the 3-mile limit from such point to be at the point on the plat marked Y-CS; and the Court has taken the liberty of connecting said two points with a line. All points and lines placed upon said plat by the Court are in red ink. It is contended by the libellant that the four islands referred to in the treaty, the boundary agreement, and the Panama Canal Act, as being in the Bay of Panama, and which was ceded to the United States, named Flamenco, Perico, Culebra, and Naos, have been connected with the mainland by a permanent dike, carrying a railroad and a highway, and that in computing the southerly boundary of the Canal Zone a measurement should be taken from the outermost point of Flamenco Island, parallel with the Panama Canal channel, a distance of 3 marine miles, which point has been indicated on the plat by the letters W-CS. Had it been shown by the evidence in this case that such connections were made prior to the boundary agreement of 1914, this question might be considered in this case; but it was not so shown, and the Court can not take judicial notice of the fact when such connection was made. The Court, therefore, does not decide the question.

The Court therefore determines the southern boundary of the Canal Zone from the provisions of the treaty, the boundary agreement, the Panama Canal Act, and its amendment, and the testimony in this case, to be a line beginning at a point marked I-CS on the plat 3 marine miles from mean low water mark designated "P" on the plat, near the boundary monument on the westerly boundary of the Canal Zone, running thence to the point on the plat marked "K;" thence to the point on the plat marked "Y-CS;" then to the point on the plat marked "R-CS," which latter point is 3 marine miles from mean low water mark at Punta Mala, the southern boundary being shown in red ink on the plat. And the Court determines that the waters northerly of such line and within the northeasterly and southwesterly boundaries thereof are within the Canal Zone and within the territorial jurisdiction of this court as such jurisdiction is conferred by the Panama Canal Act and the amendment thereto of September 21, 1922.

Such being the case, the point where Captain Lund locates the *David* at the time when the marshal arrested her, was within the Canal Zone waters; and such arrest was lawful and conferred jurisdiction of the *res* in this action.

Even without such finding, the Court under this record is impelled to hold that the testimony on the part of the claimant is insufficient to show the return of the marshal to be false as to the place where the *David* was arrested. The return of the marshal shows that the *David* was arrested in Canal Zone waters. Whether the return showed the fact that the *David* was arrested in Canal Zone waters or not, if the return shows that the vessel was in fact arrested, the presumption is that the marshal performed his duty, which was to arrest the vessel only within the territorial jurisdiction of the court. Such presumption requires clear and satisfactory evidence to overcome it. A marshal's return may not be overturned in the absence of such clear and satisfactory proof. The proof of the claimant in this case is not of that clear and satisfactory kind which will warrant the court in declaring the marshal's return to be false and declaring that the *David* was arrested outside the territorial limits over which this court exercises jurisdiction. In addition to that, the evidence of the marshal and his deputy, and the engineer of the boat, is corroborative of the return, that the *David* was arrested in waters which, under the claimant's own contention, are within the jurisdiction of the court. The marshal and deputy marshal say that the vessel was arrested just after passing between the island of Flamenco and San José Rock, and the engineer of the boat says that the vessel was arrested about 300 yards off Buoy No. 1, at the outer extremity of the Panama Canal channel, and such 300-yard limit from such buoy would be within the waters conceded by the claimant to be Canal Zone waters. The Court therefore finds upon the facts, whether the southerly boundary of the Canal Zone be as contended by the claimant, or whether it be that boundary determined to be such by this opinion, that the *David*, when arrested was in waters subject to the jurisdiction of this court; that she was "within the district" at the time of arrest. The exceptions of the claimant-respondent must therefore be overruled.

CARR *versus* CARR.

(District Court, Canal Zone, Balboa Division, November 10, 1925.)

Civil No. 479.

1. MARRIAGE. ANNULMENT. JURISDICTION.

By section 24, Act No. 1, L. C. Z., 15, the Circuit Courts of the Canal Zone were given jurisdiction of actions for annulment of marriage. This statute is confirmed by section 8 of the Panama Canal Act. District Court, having the same jurisdiction as the old Circuit Court, now has jurisdiction of annulment actions.

2. MARRIAGE. ANNULMENT.

The statutory provisions for annulment are found in paragraphs 1, 2, 3, 5, 6, 7, 8, 9, and 11 of article 140 and articles 13, 14, 15, and 16 of Law 153 of 1887 (Civil Code, pages 48, 49, 546, and 547), but this case does not fall within the provisions of such statutes.

3. COURTS. INHERENT POWERS OF EQUITY COURTS IN ANNULMENT ACTIONS.

A court of equity without the authority of a statute has inherent power to grant annulment relief in cases where the ground alleged is one upon which equity gives relief in respect to contracts generally, such as fraud, error, duress, mental incapacity, or want of consent.

4. MARRIAGE. WITNESSES TO CEREMONY. NECESSITY OF.

Under the provisions of Executive Order of May 31, 1907 (E. O., 65), witnesses to a marriage ceremony are not required and a marriage without them is valid. The provisions of the Civil Code requiring witnesses to such ceremony were repealed by such Executive Order.

5. MARRIAGE. INFORMAL.

Marriage is a thing of common right and the contract in the United States is everywhere as a civil contract. To constitute a valid marriage contract, capacity and consent must be present. Unless there is a statute declaring a marriage void if not solemnized in conformity to statutory regulations, a marriage between parties capable of making the contract and freely consenting thereto is valid as an informal marriage: (1) Where the parties intend to enter into an informal marriage; (2) where the parties intend to contract a formal marriage but a requisite formality is wanting; or (3) where the parties intend to contract a valid marriage but an impediment or incapacity existed which has been subsequently removed.

6. COMMON LAW. APPLIED BY ANALOGY.

While the body of the common law has not been expressly applied to the Canal Zone, yet, in view of the fact that the inhabitants of the Zone are principally citizens of the United States, or thus form common law jurisdictions, such common law rules may be considered in determining a proper rule of law to be applied to the solution of legal questions here which are not governed by statutory regulation; thus placing the law in this jurisdiction in harmony with the laws of the United States.

Attorney for plaintiff, *E. M. Robinson.*

Attorney for defendant, *L. S. Carrington.*

MARTIN, District Judge. Equity action instituted by the petitioner to cancel and declare null a return on a marriage license of record in the clerk's office in the Cristobal Division of this court. The sole ground of challenge is, that no marriage was performed under the license in the Canal Zone, but that a ceremony was performed in Colon, in the Republic of Panama; that the marriage is illegal and the return false and untrue. The defendant appeared in the action, denied that the marriage was not performed in the Canal Zone, and denies the falsity of the return, and pleads affirmative matters confirming the legality of the marriage. The issue for determination is, whether there was a legal marriage between the parties, and whether a ceremony was performed in the Canal Zone or not.

The facts may be briefly stated. The plaintiff, a resident of the Canal Zone, and an employee of The Panama Canal, invited the defendant to come from the United States to the Canal Zone and marry him, which invitation was accepted by the defendant. She arrived on the Canal Zone July 25, 1913. The plaintiff met her at the boat and accompanied her to the office of the Clerk of Courts, where they jointly applied for and obtained a marriage license. On the preceding day the plaintiff had arranged with Rev. Edward J. Cooper, Rector of Christ's Church-by-the-Sea, Colon, Republic of Panama, to perform the marriage ceremony, and undisputedly Reverend Cooper was at the court house at the time the marriage license was issued. The plaintiff says that no marriage ceremony was there performed, but that when the license was procured the plaintiff and defendant and Reverend Cooper went to Christ's Church, in Colon, where the marriage ceremony between the plaintiff and defendant was performed. The defendant says that the plaintiff explained to her before they reached the court house, that the civil ceremony would be performed at the court house and that they would then go to Christ's Church, in Colon, for the religious ceremony. She says further, that a ceremony was performed at the court house after the license was procured, and that at the conclusion thereof Reverend Cooper pronounced the plaintiff and defendant man and wife, and that the parties and Reverend Cooper then went to Christ's Church, in Colon, where another ceremony was performed. The defendant's testimony in this regard is fully corroborated by Reverend Cooper, who produced his record book in which he makes a memorandum of marriages performed by him at the time of performance thereof. He says that at the court house he caused the parties to join hands, asked the plaintiff if he took the defendant for his lawfully wedded wife, and asked the defendant if she took the plaintiff as her lawfully wedded husband, and that upon answers being given in the affirmative he there pronounced them man and wife; that the parties then went to Christ's Church-by-the-Sea, in Colon, where the sacramental marriage service was performed.

After the ceremony at Christ's Church-by-the-Sea, in Colon, was performed, Reverend Cooper executed and delivered to the defendant a marriage certificate, which has been offered in evidence as "plaintiff's exhibit No. 1," and made return on the marriage license showing that the marriage ceremony of the plaintiff and defendant was performed at "Christ's Church and Cristobal in the Canal Zone," which was filed with the clerk and registered on the 29th of July, 1913, as shown by exhibit No. 2. The marriage ceremony between the parties, whether legal or not, was entered into by each of them in the utmost good faith, and with the present intention of thence forward being husband and wife, and pursuant thereto, in like good faith, they consummated the

marriage contract by coition, by residing and cohabiting together as husband and wife, and holding each other out to the world as lawfully married, from that time until sometime in the year 1923, when they separated. Both parties to the contract believed the marriage to be valid and binding until October 8, 1925, when the plaintiff was informed that the marriage was invalid, resulting in the institution of this suit. The defendant still affirms the validity of the marriage contract.

ANNULMENT.

The first contention of the plaintiff is, that this suit in effect is one to annul the alleged marriage between the parties. If so treated, is the plaintiff entitled to maintain the same?

By the terms of section 8 of the Panama Canal Act (T. & A., 84; 37 Stat., 560), this court was given jurisdiction, among other things, of all matters and proceedings which were within the jurisdiction of the Supreme, Circuit, and District Courts under the laws enacted by the Isthmian Canal Commission. By subdivision 5 of section 24 of Act No. 1, adopted by the Isthmian Canal Commission (L. C. Z., 15), the Circuit Court was given original jurisdiction "in all actions for annulment of marriage." There are two classes of such actions within the jurisdiction of a court of equity in the Canal Zone, viz: (First), those based upon statute; and (second), those where the court, acting as a court of equity, exercises jurisdiction by virtue of its inherent powers. Some of the statutory provisions hereafter cited include cases where a court of equity might act without a statute. The Civil Code provides for annulment of marriage and its effects in the cases mentioned in paragraphs 1, 2, 3, 5, 6, 7, 8, 9, and 11, Art. 140 (paragraphs 4, 10, 12, 13, and 14 having been repealed), and articles 13, 14, 15, and 16 of law 153 of 1887. (C. C. pp. 48, 49, 546, 547.) An examination of the portions of Art. 140 not repealed, and the articles cited from Law 153 of 1887, clearly shows that the ground upon which the plaintiff claims the right to annul this marriage is not found in any such statutory provisions.

Looking to the second class of cases, we find that a court of equity without the authority of a statute may take jurisdiction of such a suit where the ground alleged is one upon which equity gives relief in respect to contracts generally, such as cases of fraud, error, duress, mental incapacity, or want of consent. In other cases, however, where the marriage is alleged to be void by reason of a subsisting marriage, or consanguinity, or impotency, the court is without power to grant annulment in the absence of express statutory authority (38 C. J., 1348). The plaintiff's action does not fall within the class of cases over which a court of equity has inherent power and jurisdiction.

There being neither statutory nor inherent power lodged with this court to entertain the plaintiff's action on the ground alleged, this contention is held to be without merit.

WITNESSES TO MARRIAGE CEREMONY.

A second contention of the plaintiff is, that two witnesses to the marriage ceremony is necessary to give it validity. The Civil Code, Arts. 126, 135, 137 (pp. 44-46), and Art. 13 of Law 153 of 1887 (p. 546), requires, among other things, two sworn witnesses to the marriage ceremony to make it valid. By the Executive Order of the President of May 9, 1904, these provisions of the Civil Code became the law of the Canal Zone. May 31, 1907, the President by another Executive Order (E. O. 65), validated all marriages previously celebrated in the Canal Zone and adopted a short marriage code for the Canal Zone. This order prescribed the formalities thereafter to be observed in the performance of such ceremonies, and by clear implication repealed all those provisions of the Civil Code requiring such ceremonies to be witnessed. This marriage code in brief gives judicial officers and ministers of any religious society or denomination in good standing authority to celebrate marriages within the Canal Zone if the parties first procure a license from the Clerk of the Circuit Court therefor; requires that such judicial officer or minister must make return of each marriage upon the license to the Clerk, issuing the same for the purpose of registration, and imposes criminal liability for failure to make such return. It is apparent that the chief purpose of this Executive Order was the requirement that marriages thereafter celebrated in the Canal Zone should be registered for the purpose of perpetuating proof thereof. This Executive Order does not require witnesses to such marriage ceremony, and they are not necessary to the validity of the marriage in the absence of express statutory provision therefor. (*Meister vs. Moore*, 96 U. S., 76; 38 C. J., 1314.) This contention of the plaintiff therefore is not available to him.

COMMON LAW, OR INFORMAL MARRIAGES.

There is another reason which persuades the court that the plaintiff should be denied relief in this proceeding. He comes into court, challenging the legality of his marriage to the defendant and seeking its annulment and the destruction of the proof thereof in a case where admittedly the parties can not be placed in *status quo*. He admits that both parties adhered to the marriage contract, which he challenges, as a valid contract, until October 8, 1925. Until this latter date as far as the record discloses each of the parties believed in the utmost good faith they were bound by the marriage tie until it might be dis-

solved by death or divorce. There is no statute in this jurisdiction, as there is in some, declaring all marriages void unless the ceremony is performed according to prescribed formalities. Conceding, for the purposes of this opinion, that the only ceremony purporting to unite these parties in marriage was performed in Colon, Republic of Panama, as the plaintiff contends, and conceding that Reverend Cooper had no authority to perform such ceremony there under a Canal Zone license, what status shall the Court assign to these parties under the admitted facts disclosed in this proceeding? Shall the Court say under such circumstances, that either party at will may have the marriage contract dissolved and declared illegal from the beginning, with all of the unwholesome influences and evils which would surely attend the announcement of such a rule merely because some informality inhered in the performance of the marriage ceremony where the statute does not declare nullity because thereof? To so hold would effectually remove at one stroke, in this jurisdiction, the foundation upon which the structure of civilized society rests; and this Court is not prepared to do that.

Where then may the Court look for justification for the adoption of a rule which will at once protect and preserve society and do justice to such litigants and their issue, if any, and what shall that rule be?

Marriage is a thing of common right, recognized as such from the time of the first man and the first woman. It is the policy of every civilized society to encourage it. In United States jurisdictions it is everywhere regarded as a civil contract. (*Meister vs. Moore, supra.*) To constitute a valid marriage contract, the essentials common to all contracts, capacity and consent, must be present. (*Travers vs. Reinhardt, 205 U. S., 423.*) While it is true that in most jurisdictions statutes prescribe additional requirements, it is well settled that such statutes are directory merely unless they expressly declare that a marriage contrary to their provisions shall be invalid. (*Meister vs. Moore, supra; Travers vs. Reinhardt, supra; Ex parte Suzanna, 295 Fed., 713; Reid vs. Hartrader, 264 Fed. 834; Great Northern Ry. Co. vs. Johnson, 254 Fed., 683; 38 C. J., 1280 and cases cited.*) The language used in *Meister vs. Moore, supra*, is so apt that the Court quotes therefrom as follows:

Statutes in many of the States, it is true, regulate the mode of entering into the (marriage) contract, but they do not confer the right. Hence, they are not within the principle, that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive. No doubt a statute may take away a common law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as

merely directory instead of being treated as destructive of a common law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity.

And this rule thus announced has been adhered to by the Supreme Court of the United States, and by the Federal, district, and circuit courts, and by the overwhelming weight of authority in State jurisdictions; so that it may be considered as thoroughly established in United States jurisdictions. A few States, it is true, hold to a different rule, and a few States have adopted statutes which expressly declare marriages to be void which are not celebrated in the forms prescribed by the statute.

The case of *Travers vs. Reinhardt* is a very instructive case as applied to the facts in this case as the plaintiff contends them to be. A marriage ceremony, the exact nature of which not appearing, was performed between Travers and Sophia V. Grayson in 1865, at Alexandria, Va., by a friend of Travers supposed by the woman to be a minister entitled to officiate in that capacity, although there was no license present authorizing the marriage. It appears that the person performing the ceremony was not a minister. It had been held by the courts of Virginia that such a marriage was not valid as a common law or informal marriage. Thereafter, until the death of Travers, Sophia V. Grayson was known as Mrs. Travers; the parties lived together as husband and wife; the marriage contract was fully consummated by the parties, and they held each other out to the world as lawfully married persons. Shortly after the marriage ceremony the parties left Virginia and went to New Jersey, where they lived as husband and wife for a short time, and in 1867 removed to Maryland, where the parties lived together as husband and wife until 1883 when they removed to the State of New Jersey. The decisions of the courts of Maryland did not recognize common law or informal marriages. Some months after the the parties went to New Jersey, Travers died, leaving a will in which he named "Sophia, his wife," as executrix. Conceding that the marriage could not have been recognized by the courts of Virginia or Maryland as good at common law, the Supreme Court of the United States nevertheless after reviewing the authorities decides that the evidence was sufficient to show a good common law marriage in the State of New Jersey, the courts of which did then recognize common law marriages. After citing *Meister vs. Moore*, *supra*, the court then proceeds to quote, with approval, from *Maryland vs. Baldwin*, 112 U.S., 490, the following:

It is proper to say that, by the law of Pennsylvania, where, if at all, the parties were married, a marriage is a civil contract, and may be made *per verba de proesenti*, that is, by words in the present tense, without attending ceremonies, religious or

civil. Such is also the law of many other States in the absence of statutory regulation. It is the doctrine of the common law. But where no such ceremonies are required, and no record is made to attest the marriage, some public recognition of it is necessary as evidence of its existence. The protection of the parties and their children and considerations of public policy require this public recognition; and it may be made in any way which can be seen and known by men, such as living together as man and wife, treating each other and speaking of each other in the presence of third parties as being in that relation, * * * .

The Supreme Court, in this same case also quoted the following rules from the Maryland court, with approval:

The law has wisely provided that marriage may be proved by general reputation, cohabitation, and acknowledgment; when these exist, it would be inferred that a religious ceremony has taken place; and this proof will not be invalidated because evidence can not be obtained of the time, place, and manner of the celebration of the marriage. * * * Where parties live together ostensibly as man and wife, demeaning themselves toward each other as such, and are received into society and treated by their freinds and relations as having and being of that status, the law will, in favor of morality and decency presume that they have been legally married. * * * Indeed the most usual way of proving marriage (common law marriage), except in actions for criminal conversation, and in prosecutions for bigamy and the like, is by general reputation, cohabitation, and acknowledgment.

Of course the evidence in each case must be clear and satisfactory that the parties have mutually consented in good faith to become and thereafter be husband and wife (38 C. J., 1317-1318); and each case must be decided upon its own facts.

From these authorities the Court reaches the conclusion that the proper rule for this jurisdiction, following the decisions of the United States Supreme Court and other Federal courts, as well as the overwhelming weight of authority in State jurisdictions, etc: It must be clearly and satisfactorily shown that there was an actual and mutual agreement to enter into the matrimonial relation, permanent and exclusive of all others, and with matrimonial intent between parties capable in law at the time of making such a contract, consummated by cohabitation of the parties matrimonial in nature and their mutual assumption openly of marital duties and obligations; and that where such conditions exist the marriage may be created (first), where the parties intend to enter into an informal marriage; (second), where the parties intend to contract a formal marriage and a requisite formality is wanting; and (third), where the parties intend to contract a valid marriage but an impediment or incapacity existed which has subsequently been removed.

Is there any obstacle to the adoption of such rule in this jurisdiction? As has been said, there is no statute in this jurisdiction which precludes the adoption of such a rule. The Court can find no good reason in fact for not adopting it. To adopt the rule contended for by the plaintiff in this case would lead to many evil results. It would affect the ties of affinity and consanguinity; it would cast shame and humiliation upon

the children of such a union if the union were dissolved; it would preclude the wife after dissolution from enjoying the society and support of the husband, or it would deprive the husband of the society, aid, and assistance of his wife. It would affect the question of the descent and distribution of the property of the spouses, at least such property as was owned by them at the time they assumed the marital relation; it would cast upon both parties to the supposed contract after dissolution shame and humiliation for their conduct during the time when they had lived together as husband and wife; it would injuriously affect the peace and preservation of society and might affect the legitimacy of the children, if any, and their right to inherit the property of the father or the mother, or both. Such evil consequences should not be tolerated if any reasonable way may be found for avoiding them.

It is true that the body of the common law, as that term is used and understood, has never been expressly applied to the Canal Zone, and it is equally true that the decisions referred to in this opinion are based upon what is called a common law rule; but it has been held by the Supreme Court of the Canal Zone in an action to establish a resulting trust that in cases arising after the establishment of the United States Courts for the Canal Zone, relief is to be given in harmony with the established law of the United States where life, liberty, or property are involved, and that the proper construction and remedies granted by courts of the United States are a charge on and a jurisdictional part of the courts of the Canal Zone. (*Kung Chung Chong vs. Wing Chong*, 2 C. Z. R., 25-30.) A similar holding is found in *Fitzpatrick vs. Panama R. R. Co.*, 2 C. Z. R., 111, a case of statutory construction. Similar decisions are to be found in *Panama R. R. Co. vs. Bosse*, 249 U. S., 41-45; and *Panama R. R. Co. vs. Rock*, 266 U. S., 209-214. Therefore, even though the common law in a strict sense may not have been expressly applied to or be in force in this jurisdiction, yet its principles may be applied by analogy in the formulation of a rule for the solution of such cases as the instant one, where there is no applicable statute rule. In this manner the law in this jurisdiction may be brought into harmony with that of the United States, for the government and guidance of the population here, consisting largely of citizens of the United States who are familiar with its customs, institutions, and laws, and others here who are familiar with common law rules; and these comprise practically the entire population of this jurisdiction. The Court, therefore, contemplating the adverse influence and evil results that would surely follow the adoption of the rule for which the plaintiff contends, prefers to adopt the rule of decision in such cases announced by the courts of the United States sustaining what is there called common law marriages, but which are in fact merely informal marriages.

Tested by such rule, there is no difficulty in determining, as the court does determine, that the plaintiff and defendant were legally married July 25, 1913, even though the marriage ceremony as contended by the plaintiff, was performed only in Colon, Republic of Panama. To hold such marriage valid, does justice to the parties according to their intent and their acts, and according to the ceremony performed at the time stated. Such rule will do justice to other parties similarly situated, and will protect the issue of such marriages, if there be any; and tend to the preservation of the social fabric.

The burden of proof is upon the plaintiff to establish his case; this burden has not been sustained. The plaintiff alone testifies that there was no marriage ceremony between these parties performed by Reverend Cooper at the Court House in Cristobal, Canal Zone. The defendant and Reverend Cooper testify that there was such a ceremony there performed, and the circumstances testified to by all the witnesses corroborate the defendant and Reverend Cooper, and the Court finds as a fact that a valid ceremony was performed between these parties at Cristobal, in the Canal Zone. An order will accordingly be entered dismissing the action, with costs awarded to the defendant.

MAGUIRE *versus* RUCK.

(District Court, Canal Zone, Balboa Division, December 7, 1925.)

Civil No. 706.

1. MASTER AND SERVANT. DISCHARGE OF SERVANT.

Where a contract of employment is for a fixed period, the master may not discharge the servant except for sufficient cause.

2. MASTER AND SERVANT. DISCHARGE. BURDEN OF PROOF.

Where the master discharges the servant before the end of a fixed term of employment, the burden is on the master to plead and prove that there was sufficient cause for the discharge in order to relieve the master from liability.

3. MASTER AND SERVANT. DISCHARGE DAMAGES.

Where the servant is wrongfully discharged, the damages resulting is the contract wage for the remainder of the term less what the servant made or does reasonably earn during such time; and the burden is on the master to plead and prove that the servant can obtain, or has obtained, other employment and the amount which may be or has been earned thereby.

4. LIBEL AND SLANDER. CHARGE OF THEFT SLANDEROUS *PER SE*.

Where the master accuses the servant in the presence of a third person with stealing property, such charge is slanderous *per se* from which malice will be implied and for which damages will be awarded.

Attorney for plaintiff, *E. M. Robinson*.

Attorney for defendant, *Felix E. Porter*.

MARTIN, District Judge. Plaintiff bases her right of recovery on two causes of action: (1) For damages for the alleged breach by the defendant of a written contract of employment between the parties, entered into February 1, 1925, for a period of 6 months at a salary of \$125 a month, by the discharge of the plaintiff from such employment May 15, 1925, the damages claimed being loss of salary, amounting to \$375, for 3 months, and return transportation to New York, \$110; and (2) the alleged slander of the plaintiff by the defendant, it being charged that the defendant, in the presence of others, said that the plaintiff was a thief and had stolen a pair of nail clippers owned by the defendant, with resulting damage of \$2,000.

Defendant's defense is rested on (1) An admission of employment of the plaintiff and her discharge, with allegations that such discharge was for sufficient cause; (2) a denial of the alleged slander, and (3) a cross action based upon the misconduct of the plaintiff while in the defendant's employ, resulting in loss of patronage and damage to her business in the sum of \$1,000.

The court finds the facts to be as stated below:

For some time prior to February 1, 1925, defendant had leased and was operating beauty parlors at the Balboa and Ancon clubhouses, in the Canal Zone. She had made a verbal contract with a Mrs. Anderson, an expert hairdresser, to come from New York to the Canal Zone and enter her employ, but Mrs. Anderson notified her sometime prior to February 1, 1925, that she could not come. Defendant then instructed Mrs. Anderson to send a substitute, and Mrs. Anderson, pursuant to such instruction, procured the plaintiff to come to the Zone for the purpose of entering the defendant's service. Upon arrival, after conference between the parties hereto, a written contract was entered into February 1, 1925, containing the terms of employment of plaintiff by defendant. Defendant had already paid plaintiff's transportation to the Canal Zone. So far as material here, the contract provides: "(3) it is mutually agreed that the hours for work are from 9 a. m. to 6 p. m., with an interval of 1 hour for lunch; (4) Mrs. Helen Ruck agrees to pay to Miss Maguire a salary of \$125 a month starting for 6 months, and further agrees that, if the services of Miss Maguire are satisfactory to her, that she will increase her salary after 6 months. (5) Mrs. Helen Ruck further promises and agrees to pay the passage of Miss Maguire back to New York at the end of 1 year if she is still working for Mrs. Ruck and her services have been satisfactory at the end of that time."

Under this contract plaintiff worked for the defendant from February 1, 1925, to May 9, 1925, inclusive, when the defendant handed to plaintiff the written letter of discharge dated May 9, 1925, and reading:

This is to inform that you are discharged at the end of business on Friday, May 15th, allowing you 5 days furlough to make arrangements to return to the United States within that time.

And the defendant, by her pleading, proceeds upon the theory that she is liable to the plaintiff for the plaintiff's salary up to and including May 15, 1925. Defendant has paid plaintiff's salary to May 1, 1925.

The reasons given upon the trial by the defendant for the discharge of the plaintiff are: (1) Discourteous treatment of patrons of the defendant, resulting in loss of such patronage; (2) Incompetent work on the part of the plaintiff, resulting in loss of patronage to the defendant; (3) The alleged misappropriation of money belonging to the defendant by the plaintiff; (4) The use of defendant's appliances in performing service for patrons without charge; (5) The use by the plaintiff for improper personal purposes of sanitary face towels provided by the defendant for use in her business; (6) Discourteous treatment of the defendant by the plaintiff.

The burden of proof being upon the defendant to establish such matters as a cause for the discharge of the plaintiff, the Court finds that none of said causes have been established. Many of the matters complained of were not mentioned by the defendant to the plaintiff nor an explanation thereof requested. With respect to some of them, as, for instance, the disappearance of the nail clippers, it is not shown, nor attempted to be shown, that the plaintiff took them, but it is shown that other persons in the employ of the defendant had ample opportunity to take them if they so desired, while the plaintiff positively denies that she did take them. The Court reaches the conclusion, from the testimony in the case, that the defendant listened to idle rumors and gossip intended to prejudice the plaintiff in the defendant's estimation, and that such differences as the plaintiff and defendant had were not of such a character as to justify the defendant in discharging the plaintiff, and the Court finds that the defendant was not justified upon any ground in discharging the plaintiff on the 9th of May, 1925. The Court finds that the plaintiff is entitled to recover her wages from May 1 to May 15, 1925, amounting to \$62.50, less the sum of \$3 which the plaintiff admits she took from the cash box of the defendant and which the Court finds she offered to repay but that the defendant said it could be deducted from her salary account. The court further finds that the plaintiff is entitled to damages for loss of employment due to the unjustified termination of the contract by the defendant from May 15 to July 31, 1925, less such employment as the plaintiff was able to secure; and the Court finds that the lost time of the plaintiff when she was not able to secure other employment during that period amounted to 20 days and that she is entitled to

\$96.20 on account thereof, and that the total recovery to which she is entitled on her first cause of action is the sum of \$155.70.

Adverting to the terms of the contract, it is apparent that the rights of the plaintiff and the defendant are to be determined relative to this matter by the first clause of paragraph (4), reading as follows: "Mrs. Helen Ruck agrees to pay to Miss Maguire a salary of \$125 a month starting for 6 months." This is a plain contract for at least 6 months employment, at the salary stated. The contract is devoid of any conditions annexed thereto. The remaining clause of paragraph 4 relates to an increase of salary after 6 months if the plaintiff's services are satisfactory to the defendant, and as to the actual service performed for 6 months the last clause of paragraph (4) does not apply.

Under a contract for a fixed period, where the employer terminates it before the end of the contract period, the employer is subjected to such damages as may flow from the breach of the contract for the remainder of the contract period, unless the discharge was justified. (26 Cyc., 987-999.) If the employer seeks to justify, as the defendant does in this case, the burden of proof is upon the employer to establish by the preponderance of the evidence a reasonable and sufficient cause for discharge. (26 Cyc., 1006.)

On the other hand, when an employee is wrongfully discharged, it is the duty of that employee to secure other employment for the remainder of the term if reasonably possible, and to credit the employer with such earnings as may be made for the remainder of the contract period on the wages which would otherwise have been paid to the employee under the contract. (26 Cyc., 1000.) Under these rules, therefore, the Court has held, and now holds, that the discharge was made without sufficient cause, and that the plaintiff is entitled to recover as damages for her loss of employment what she would have earned under the contract, less what she did earn in other employment.

The pathway of the Court in reaching a conclusion as to the amount of the plaintiff's recovery has not been clearly illumined by the testimony in the case, but the Court has reached a conclusion which it believes does substantial justice in the case.

With respect to the claim of the plaintiff for return transportation to New York; this can not be allowed. Paragraph 5 of the contract is an agreement on the part of Mrs. Ruck to pay this transportation only on condition that the plaintiff remain in the defendant's employ for a period of 1 year, and upon the further condition that the plaintiff's services were satisfactory at the end of that time. Under no conceivable view which may be taken of the contract under the evidence disclosed can the plaintiff recover transportation to New York. In addition to that, there has been no evidence offered tending to show the cost of such transportation, and for lack of such proof the

court would be without power to make a valid finding of fact or a valid judgment thereon.

As to the second cause of action: The Court finds that the defendant charged the plaintiff, in the presence of Mrs. Lewis, with being a thief and having stolen a pair of nail clippers owned by the defendant. These charges were in effect repeated to the witness, Booz. Such a charge is slanderous *per se*, and having been uttered in the presence of Mrs. Lewis, the charge gives rise to a cause of action for damages to the plaintiff because thereof. Malice is implied from the making of a statement slanderous *per se*, and without a showing of special damages flowing from the speaking of such words plaintiff is entitled to recover such compensation as will fairly compensate her for the resulting shame, humiliation, or loss of reputation resulting therefrom. Considering the testimony, the situation of the parties, and the usual and necessary consequences resulting from the speaking of such words, the Court finds that the plaintiff has suffered damage because thereof in the sum of \$300, and finds that the plaintiff is entitled to recover such sum on account of the speaking of such words.

As to the defendant's cross action, the Court finds that the defendant has failed to sustain the burden of proof resting upon her with respect to that cause of action, and finds the facts against her thereon, and finds that she is not entitled to recover anything because thereof.

Let judgment be entered for the plaintiff for the sum of \$455.70, with interest from this date at 6 per cent, and for costs and disbursements in this action. To all of which defendant excepts.

GOVERNMENT *versus* BLACKER.

(District Court, Canal Zone, Cristobal Division, December 21, 1925.)

Criminal No. 1578.

1. CRIMINAL LAW. CONFESSION DEFINED. VOLUNTARY AND INVOLUNTARY. PRESUMPTION.

The term "confession" means a person's voluntary declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. To be admissible, a confession must have been voluntarily made. But, generally, it will be presumed that a confession is voluntary, and the defendant has the burden of showing its involuntary character.

2. CRIMINAL LAW. ADMISSION DEFINED. ADMISSION RECEIVABLE WHETHER VOLUNTARY OR INVOLUNTARY.

An "admission" is a statement or declaration made by the defendant, either before or after the commission of a crime, not amounting to a confession of guilt but from which, in connection with other evidence, an inference of guilt

may be drawn. Admissions are receivable in evidence without regard to whether they were made voluntarily or involuntarily.

Attorney for the Government, *J. J. McGuigan*, Assistant District Attorney.

Attorney for defendant, *J. J. Enderton*.

MARTIN, District Judge. The defendant was charged in this case with the crime of involuntary manslaughter by the killing without malice of one Turner by striking him with an automobile driven by the defendant at an unlawful rate of speed and without due care and circumspection. To the information the defendant pleaded not guilty. A jury was impaneled to try said cause and a verdict of guilty was returned against the defendant. A motion for a new trial has been filed upon the grounds: (1) That the verdict is contrary to law; (2) that it is contrary to the evidence; (3) that the evidence is insufficient to justify the verdict because there was no evidence to show that defendant operated the automobile which caused the death of Turner; (4) that the court erred in admitting the testimony of Hibbert, a policeman, as to the speed of the automobile that passed Hibbert just after the injury to Turner; (5) that the testimony of Hibbert is not sufficient to show that the defendant attempted to escape by flight; and (6) that the court erred in admitting the testimony of Baldwin, a police officer, as to the defendant's statement to such police officer some hours after the transaction in question that the defendant told the police officer he drove the car to Coco Solo from Colon that morning and in overruling the request of defendant's counsel for permission to question the police officer to ascertain "whether such confession by defendant was voluntary or involuntary."

1. As to the second and third grounds of the motion, challenging the sufficiency of the evidence to justify the verdict, the Court need only say that there was evidence tending to support all of the material allegations of the information. It was the province of the jury to determine whether such facts showed the guilt of the defendant, and the jury having found that such facts were sufficient to show guilt and there being no suggestion in the record that the jury were influenced by passion or prejudice or failure to properly perform their duties as jurors, the verdict of the jury should not be disturbed.

2. As to the fourth and fifth grounds of the motion, relating to the action of the Court in admitting the testimony of Hibbert, a policeman, who testified to the speed of the car that passed him about two or three hundred feet beyond the place where the automobile struck and killed Turner, it is only necessary to say that if the defendant knew that his automobile had struck Turner it was his duty under the law and as a reasonable man to stop and ascertain what injury had

been done and to immediately report the fact of the accident to the police department, and under such circumstances such evidence was competent as tending to show the criminality of the defendant's act, if he knew that his car had struck Turner. On the other hand, if he did not know that he had struck Turner, then the testimony of Hibbert would be rather in his favor. In any event, the testimony of Hibbert with respect to the movement of the automobile which passed Hibbert at the time in question was of such a nature as to show that the driving of the automobile at that time and place was a part of the *res gestae* and as such was admissible.

3. The first and sixth grounds of the motion may be considered together. The testimony of the policeman Baldwin as to what occurred at Coco Solo some hours after the killing of Turner shows that he sought to ascertain what person had driven the Buick automobile to Coco Solo about 3.40 or 4.00 o'clock that morning, and it was there ascertained that probably the defendant was the person in question. The defendant's commanding officers sent for him, and in the presence of two of them and the witness, Baldwin, the defendant was questioned about the matter. It appears that one of his commanding officers told him that he had best tell the truth about the matter, or words to that effect. In answer to the question propounded the witness by the District Attorney: "Who drove the automobile to Coco Solo that you saw there damaged on the morning of the accident?" was answered by the witness: "Blacker told me that he drove the car to Coco Solo from Colon that morning." Counsel for defendant then asked the court for an examination on preliminary proof as to whether such confession by defendant was voluntary or involuntary, the motion was overruled and the defendant noted an exception, and that ruling is now assigned as error in the motion for a new trial. The determination of the question thus presented turns largely upon the answer to the query, "Is the answer given by the witness Baldwin (set forth above) a confession or an admission?"

By all of the authorities, a confession is a person's voluntary declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. (16 C. J., 715; *People vs. Jan John* (Cal.), 77 Pac., 950; *People vs. American* (Cal.), 50 Pac., 15; Underhill Criminal Evidence, section 215, p. 303.) Before a confession is admissible in evidence it must be shown that it was freely and voluntarily made. It must not have been obtained by any sort of threat or violence, nor by any promise, direct or implied, nor by the exertion of any influence. As a general rule, however, it may be stated that the confession will be presumed to be voluntary unless it appears that it was inspired by a threat or a menace, or procured by promises or inducements or the expectation of some hope or benefit. (Underhill

Criminal Evidence, section 217, pp. 308-9; *Perovich vs. U. S.*, 205 U. S., 86; *Murphy vs. U. S.*, 285 Fed., 801 (7th C. C. A.); *Certiorari denied*, 261 U. S., 617.) Even though it be conceded for the sake of argument that the statement of the defendant to the witness, Baldwin, shall be treated as a confession, still there is nothing disclosed by the record to show that the statement was not voluntarily made; there is nothing to show that it was inspired by threat or menace, or procured by promises or inducements or the expectation of some hope or benefit. Where such expressions are made to a person accused of crime that he had "better tell the truth" or "it will be best for you to tell the truth," it is usually held that such statements alone are not sufficient to defeat the admission of the confession in evidence. (*Murphy vs. U. S.*, *supra*.) Neither is it necessary that the defendant be advised of his rights, nor instructed that statements made by him may be used against him, if it appears that his confession was made otherwise freely and voluntarily. (*Wilson vs. U. S.*, 162 U. S., 613.) It thus appears that under the record there was no error in the ruling of the Court denying the defendant's motion.

But the statement by the defendant to the witness Baldwin is not a confession. It is an admission. An admission is a statement or declaration by the accused, either before or after the commission of the crime, not amounting to a confession of guilt but from which, in connection with other evidence, an inference of guilt may be drawn. (16 C. J., 626.) And such admissions are admissible in evidence whether they are voluntary or involuntary. They are statements of fact from which, in connection with the other evidence, guilt may be inferred. (*Miles vs. U. S.*, 103 U. S., 304 at 311; *State vs. Campbell* (Kan.), 85 Pac., 784; *State vs. Willis* (Conn.), 41 Atl., 820 at 826-7; *People vs. Ammerman*, *supra*; *People vs. Jan John*, *supra*; *People vs. Gonzales* (Cal.), 237 Pac., 812; *People vs. Ford* (Cal.), 143 Pac., 1075.) In the *Miles* case, the defendant was prosecuted for bigamy and it was there held that proof of his former marriage might be shown by his admissions thereof. His former marriage was a fact necessary to be proven in order to sustain a conviction in the case, but his admission of the former marriage was held not to be a confession but sufficient, when taken in connection with the other facts in the case, to warrant the jury in finding him guilty of the crime charged.

So, in the present case, the mere fact that the defendant admitted to the witness Baldwin that he drove the car in question from Colon to Coco Solo in the morning of the day when Turner was struck and killed, was not a confession of guilt. It was lawful for him to drive a car on that public road at that time. The fact that the car struck and killed Turner might have been an accident or misadventure. It might have been due to circumstances over which the defendant had

no control. It might have occurred while the defendant was driving along the highway lawfully and in the exercise of due care and caution. The admission by the defendant that he drove the car in question at the time in question is not, therefore, a confession of guilt. It is an admission of a fact which, taken in connection with other facts proven in the case, had a tendency to establish guilt, just as the prior marriage of the defendant in the Miles case, together with the other facts and circumstances in the case, tended to show that the defendant was guilty of bigamy in marrying the prosecutrix in that case. The defendant's statement was a mere admission receivable in evidence without respect to whether it was made voluntarily or involuntarily.

There was, therefore, no error in denying the defendant's motion to submit preliminary proof at the time the witness Baldwin testified to such admission made by the defendant.

There being no error of law apparent in the record, and none assigned in the motion for a new trial, the motion and each ground thereof must be denied.

Let an order be entered to that effect.

INDEX DIGEST.

ABATEMENT.

1. *Res judicata*. A plea of *res judicata* is a plea to bar and not in abatement. *Reeves v. Reeves*, 576.

ACTIONS.

See Mortgages (1); Guardian (1); Employer and Employee (1).

1. Action for wrongful death; Survival; Jurisdiction. An action for wrongful death does not survive in the Canal Zone except under the Canal Zone Employers' Liability Act. *Lebert, Admx. v. Pacific Mail S. S. Co.*, 121.
2. Survival of, for wrongful death. An action for wrongful death survives under Art. 2341 of the C. C. *Castilla v. P. R. R. Co.*, 220. *Rock v. P. R. R. Co.*, 220.
3. Local and transitory. Action in tort for damages to real property in Republic of Panama is a local and not a transitory action and this court has no jurisdiction. *Teran v. Smith*, 344.
4. Suits *in forma pauperis*. Only an American citizen is entitled to sue *in forma pauperis*. *Shaw v. Bergen Point Iron Works*, 353.
5. Premature. A policy of insurance on which action is brought barred the bringing of an action until the expiration of 90 days from time proofs of loss are furnished, action will be held premature in absence of allegation and proof that 90 days have elapsed since proofs of loss were furnished. *Otero v. Maryland C. Co.*, 360.
6. Verdict curing defects. A verdict may cure a defectively alleged cause of action but will not cure a defective cause of action. *Otero v. Maryland C. Co.*, *supra*.
7. Criminal actions; Parties. The proper party plaintiff in all actions for the prosecution of crimes described in the Penal Code of the Canal Zone and amendments thereto (not, however, including prosecutions under the Nat. Pro. Act, Nar. Act, White Slave Act, Crimes Committed on the High Seas, etc.), is the Government of the Canal Zone, under Sec. 5 of the Code of Crim. Pro. *Government v. Livengood*, 542.

ADMIRALTY.

See Pleading (7-16); Limitation of Actions (1-2).

1. Maritime tort; Election of remedies. Plaintiff had the right to sue in admiralty for a maritime tort, or to sue at common law under the Admiralty Act of 1789. *Lebert, Admx. v. Pacific Mail S. S. Co.*, 113.
2. Sales; When title passes. Title to property sold under admiralty process does not pass until the sale is confirmed by the court. *Panama Canal v. the Schooner "Blanche C. Pendleton"*, 165.
3. Salvage. Crew of vessel performing a salvage service is entitled to salvage even though vessels involved have a common ownership. *Falk v. S. S. "Olockson"*, 328.

4. Salvage allowance. Where salvors performed one-quarter to one-third salvage service, and vessel and cargo salvaged are valued at \$1,078,000, an allowance of \$15,000 salvage will not be increased. *Falk v. S. S. "Olockson," supra*.
5. Maritime lien. Under Act of Congress of 1910 (36 St., 604), payment of tolls through the Panama Canal is a necessary expense creating a maritime lien. *American Foreign Banking Corp. v. S. S. "Everest,"* 395.
6. Maritime lien; How created. The master, as agent for the ship, may make contracts for "repairs, supplies or other necessities," which will bind the ship unless prohibited by the charter party. *American Foreign Banking Corp. v. S. S. "Everest," supra*.
7. Maritime tort. It is the positive, continual, and nondelegatable duty of the ship to the foreman of a contracting stevedore company and his men, to furnish them a reasonably safe place to work. *Rowe v. The Royal Netherlands West India Mail Co.,* 453.
8. Are musicians "seamen"? Question discussed but not decided. *Doran, et al, v. S. S. "President Van Buren,"* 513.
9. Powers of master. The master has no authority to bind the ship or its owners beyond the end of the voyage for which he is employed. *Doran, et al, v. S. S. "President Van Buren," supra*.
10. Ship's articles, parole evidence to vary. Under the facts of this case it is *held* that a parole contract made by libellants with the master of the vessel for employment beyond the end of the voyage, as evidenced by the ship's articles, can not be considered to bind the ship or its owners. *Doran, et al, v. S. S. "President Van Buren," supra*.
11. Discharge of seamen; Mutual release. The discharge of seamen at the end of the voyage, as evidenced by the ship's articles, signed by the seamen, and the execution of the mutual release as provided in R. S. 4552, before a shipping commissioner, in the absence of fraud or coercion, conclusively binds the parties. *Doran, et al, v. S. S. "President Van Buren," supra*.

ADOPTION.

1. Minors; Decree of adoption; Fraud. Facts of the case considered, and *held* that a decree was not obtained by fraud, misrepresentation or deceit. *In re adoption of Adella Markert, minor,* 501.

ADVERSE CLAIMANTS.

1. Jurisdiction of adverse claimants. Where parties file claims with Joint Commission, each claiming compensation for the same property, and the Joint Commission refuses to act until the adverse claims are adjudicated, this court has jurisdiction to determine them. *De Obarrio v. De Arias,* 115.

ALIENS.

See Succession (1-2).

1. Deportation. Aliens convicted of crime on the Canal Zone may be deported to the country from whence they came. *Ex parte Martinez, Moreno, and Ward,* 191.
2. Deportation of aliens. If immigration authorities have jurisdiction, with defendants in custody, and grounds for deportation exist, *habeas corpus* may not be resorted to to procure their release. *Ex parte Martinez, Moreno, and Ward, supra*.

3. Deportation. Where one enters and transits the Canal Zone in violation of the Immigration Regulations, goes to and establishes residence in Colon, Republic of Panama, and he is shown to be an undesirable, he may be arrested in Colon, brought to the Canal Zone, and on due proceedings ordered deported. *Ex parte Deal*, 372.
4. Notice of immigration regulations. All persons entering or transiting the Canal Zone are charged with notice of all provisions of the Immigration Law and Regulations. *Ex parte Deal, supra*.
5. Deportation. One born in the Canal Zone territory prior to the treaty of November, 1903, is an alien and as such may be deported for legal cause. *Government v. Diaz*, 465.
6. Deportation; Acts committed in foreign country. Where petitioner entered the Canal Zone and transited it to Colon, in the Republic of Panama, which is immediately adjacent to a populous portion of the Canal Zone and to which the people of the Canal Zone have free access, and where it is found in the City of Colon that the petitioner was an undesirable, the evidence showing him to be a menace to the health of the people of the Canal Zone resorting to the City of Colon, such acts, even though committed in Colon, are sufficient to show that the petitioner should have been excluded from entry, and he may be properly deported. *In re Nuñez*, 519.

APPEAL AND ERROR.

1. When sued out. A writ of error is not "brought" or "sued out" until actually issued. *MacFarlane v. De Andrade*, 99.
2. Limitation of time. A writ of error must be sued out within six months after judgment, and such time limit is jurisdictional. *MacFarlane v. De Andrade, supra*.
3. Writ of error applicable when. Writ of error is the proper process for the transfer of a case at law to the Appellate Court. *MacFarlane v. De Andrade, supra*.
4. Issuance of execution. Where writ of error was sued out after expiration of six months from date of judgment, this court will not issue execution until dismissal of appeal by the Appellate Court. *MacFarlane v. De Andrade, supra*.
5. Costs on appeal after reversal. Where plaintiff is entitled to prosecute an action *in forma pauperis* after reversal of the case on appeal, he can not be required to pay costs of appeal as condition precedent to retrial of case in this court. *Shaw v. Bergen Point Iron Works*, 353.
6. Security to keep the peace. An action for security to keep the peace, under Title VI of the Penal Code, is a criminal action, and the entry of a judgment requiring the defendant to give a bond to keep the peace by virtue of the law imposes a jail sentence for failure to give the same and renders the case appealable under the provisions of Sec. 7 of the Panama Canal Act as amended by Act of Congress of September 21, 1922. *Government v. Mc Nalley*, 568.
7. Giving notice of appeal. Notice of appeal from the magistrate's court in a criminal action may be given either by stating orally in open court that appeal is taken after the magistrate has announced his judgment, or within 5 days thereafter filing a written notice of appeal. *Government v. Mc Nalley, supra*.
8. When appeal perfected. An appeal from the magistrate's court to the District Court is perfected by giving the notice of appeal within the required time and within five days after the judgment filing an appeal bond in such sum as may be required, not exceeding the amount fixed by statute. *Government v. McNalley, supra*.

9. Duty of magistrate where appeal taken. Where a notice of appeal is given, it is the duty of the magistrate to fix the amount of the appeal bond in a sum not exceeding \$250. *Government v. Mc Nalley, supra.*
10. Deposit of cash bond; Power of magistrate and constable. Where the magistrate indicates the amount of an appeal bond after defendant has given oral notice of appeal and the defendant then deposits with the constable the amount of such bond with notification that it is deposited as an appeal bond, neither magistrate nor constable has the power, without the defendant's consent, to apply such deposit to any other purpose than that of an appeal bond. *Government v. Mc Nalley, supra.*
11. Magistrate's transcript of record; Correction. Under Code Civil Procedure, Sec. 71, supplemented by subdivision (e) of Rule 23 of this court, embodied in Executive Order of July 28, 1925, the proper procedure for the correction of the magistrate's transcript after appeal has been perfected, is to apply to the District Court on motion for such relief, and where it clearly appears upon hearing in the District Court that the magistrate's record does not truly state the proceedings, the District Court, in furtherance of justice, may order the transcript corrected to conform to the facts. *Government v. Mc Nalley, supra.*

ARREST.

1. Legality. The Court will not inquire into the legality of arrest or how the petitioner was brought into the Canal Zone. The fact that he is in custody of the Zone gives the court jurisdiction, no matter how his presence on the Zone was obtained. *Ex parte Deal*, 372.
2. Without warrant. A peace officer may arrest without a warrant where crime is committed within his view or presence. *Government v. Flannery and Lorenz*, 592.
3. Resisting. One who wilfully resists, obstructs, or delays a peace officer in making lawful arrest is criminally responsible. *Government v. Flannery and Lorenz*, 592.

ATTACHMENT.

See Remedies (1).

1. Money in *custodia legis*. Money of defendant deposited as bail in a criminal action may be attached after dismissal of the action. *Republic of Colombia et al, v. Farjardo, H., et al.*, 35.
2. Wrongful. Attachment is wrongful where writ is issued and levied in a case where defendant is not indebted to plaintiff. *Lindo v. Barker*, 437.

ATTORNEYS.

1. Lien of. An attorney has a lien on the judgment recovered for his client and on proceeds of payment thereof, prior to all other creditors. *Carbone v. Bressie*, 160.
2. Privileged communication. Material facts communicated by a client to his attorney are privileged communications and are not admissible in evidence. *De Suze v. Arcia*, 117.

BAILMENTS.

See Contracts (5); Negligence (10-11).

BILLS AND NOTES.

See Mortgages (1).

CANAL ZONE.

See Immigration (3-6); Aliens (1-2-3-4-5); International Law (1-2-3-4-5).

1. Form of government. The Canal Zone Government is statutory and not constitutional, and the Constitution of the United States as a rule does not apply thereto. *McConaughey v. Morrow*, 377.
2. Legislation. Congress has plenary legislative power with respect to the Canal Zone. *McConaughey v. Morrow, supra*.
3. Sovereignty. The United States is the sovereign of the Canal Zone to the exclusion of the Republic of Panama under the provisions of the treaty of November, 1903. *Government v. Diaz*, 465.
4. Immigration. Under Act of Congress August 16, 1914 (T. & A., 131), the President may make, alter or amend immigration regulations relating to the Canal Zone. *Government v. Obsitnik*, 472.
5. Returning to Canal Zone. The President may prohibit a person once deported from the Canal Zone from entering, remaining, or passing over the Zone, and if so prohibited, criminal responsibility attaches under Sec. 10 of the Act of Congress of August 16, 1914. *Government v. Obsitnik, supra*.
6. Executive Orders of February 6, 1917, and September 13, 1923. These Executive Orders do not prohibit one lawfully deported from the Canal Zone as an undesirable from returning to the Zone, and in the absence of such prohibition such return is not a criminal act. Executive Order of September 25, 1913 (E. O., 151) distinguished. *Government v. Obsitnik*, 472.
7. Immigration regulations. A citizen of Cuba who comes to the port of Cristobal, is permitted to land and transit the Canal Zone to Colon, R. P., and is thereafter found to be an undesirable person, and that he was such when he entered the Canal Zone, *held* that the immigration authorities having custody of the petitioner in the Canal Zone, and having conducted proper proceedings for exclusion, may exclude and deport him. *In re Nuñez*, 519.
8. Power of Governor with respect to immigration. Under Executive Order of September 13, 1923 (E. O. 337), Governor of The Panama Canal has power to delegate to a subordinate officer or board the authority to make an order of deportation or exclusion in a proper case and after a legal hearing. *In re Nuñez, supra*.
9. Policemen of the Canal Zone are "peace officers" and "public officers." *Government v. Flannery and Lorenz*, 592.
10. How created. Canal Zone created by grant from Panama to United States by treaty and by provisions of Panama Canal Act. *General Petroleum Co. v. S. S. "David,"* 601.
11. Boundaries extended. The Boundary Convention between United States and Panama of 1914, extended the boundaries of the Zone to include Ancon Harbor. *General Petroleum Co. v. S. S. "David," supra*.
12. Southerly boundary of Zone fixed and determined. *General Petroleum Co. v. S. S. "David," supra*.

COLLISION.

1. Liability for. Where both vessels are at fault, producing a collision, the damages will be equally divided. *S. S. "Stoomvaart," etc., v. S. S. "West Himrod," United States v. S. S. "Wolsum,"* 418.
2. Where the *S. S. West Himrod* was negligently operated but danger of collision was apparent to the *S. S. Wolsum* in time for the latter to avoid the collision but failed to do so, *held* that both vessels were at fault. *S. S. "Stoomvaart," etc., v. S. S. "West Himrod," United States v. S. S. "Wolsum," supra.*

COMITY.

See Judgments (1-2); International Law (3-4-5).

COMMON LAW.

1. Vested interest. One suffering injury resulting from negligence of another has no vested right or interest in the recovery. The courts may declare, modify, or repeal the common law.
Chisholm v. P. R. R. Co., 109.
Gittens v. P. R. R. Co., 109.
Smith v. P. R. R. Co., 109.
2. In Canal Zone. The common law, as that term is usually understood, is no part of the law of the Canal Zone, and a statute can not here be said to be in derogation of the common law. *Muldoon v. Muldoon,* 475.

CONFLICT OF LAWS.

See Treaties (1-2); Constitutional Law (1-2-3).

1. Comity. Judgments of courts of foreign countries will not be recognized because of the comity between nations where the foreign law is repugnant to the local law. *Simpkins v. Simpkins,* 273.
2. Civil and military law. Where a member of the military is tried and convicted by court martial, he can not thereafter be tried in the civil courts for the same offense; but if crime charged in the civil court is a different one, conviction or acquittal by a court martial is no bar to trial in civil courts even though facts in both cases be the same. *Government v. Cox,* 355.

CONSTITUTIONAL LAW.

See Treaties (1-2).

1. Conflict of laws. Taking possession of property in the Canal Zone without the payment of compensation in advance, under the treaty between the United States and Panama does not violate the due process clause of our Constitution or the Constitution of Panama. *Bressie, et al., v. Goethals, et al.,* 38.
2. Full faith and credit clause. The "full faith and credit clause" of the Constitution does not apply to the judgments of a court of another nation. *Simpkins v. Simpkins,* 273.
3. Due process of law. The "due process" clause of the 5th Amendment of the Constitution of the United States became the law of the Canal Zone by Executive Order of May 9, 1904, and this precludes the court from entering a decree in an adoption proceeding depriving a nonconsenting natural parent of the

custody of his child until such parent has been given due notice of the proceedings and had an opportunity to defend the same, even though the Code of Civil Procedure fails to make provisions for giving notice. *In re adoption of Adella Markert*, minor, 501.

4. Due process of law defined. *In re adoption of Adella Markert*, minor, *supra*.

CONTRACTS.

1. The facts in this case held to establish a contract. *Arias, F. v. Rodriguez & Uribe*, 127.
2. Letters and telegrams. Contracts may be made by means of letters and telegrams. An offer by letter or telegram has no effect until received by addressee. Acceptance is valid when letter is mailed or telegram filed for transmission. *American T. D. Co. v. Texas Co.*, 238.
3. When created. Where minds of the parties do not meet, there is no contract created. Facts discussed and contract found to exist as to certain things. *Panama Canal, ex rel, Mohr v. Davidson*, Admr., 406.
4. Implied. Defendant rented plaintiff's car without agreement as to the price to be paid for its use. This created an implied contract to pay reasonable value of such use. *Roberts v. Biron*, 506.
5. Bailment. Defendant rented plaintiff's car without agreement as to the price to be paid for its use. This created a bailment for the benefit of both parties. *Roberts v. Biron, supra*.

CORPORATIONS.

See Principal and Agent (4); Process (1-2); Jurisdiction (3); Courts (1).

COSTS.

See Witnesses (1).

1. Original documents. Under C. C. P., Sec. 531, no costs may be taxed for production and use in evidence of original documents. *Diaz v. Patterson*, 466.
2. Taxation; Printing briefs in Appellate Courts. This court will not tax costs of printing briefs in the Circuit Court of Appeals or the U. S. Supreme Court in the absence of a local statute or rule so providing, or in the absence of statute or rule in the Appellate Courts providing therefor. Costs may be taxed only where there is statutory or rule authority therefor. *Diaz v. Patterson, supra*.

COURTS.

See Conflict of Laws (2).

1. Jurisdiction; Service of summons on foreign corporation. Service of summons on a director of a foreign corporation while present in the Canal Zone as a witness in court, does not confer jurisdiction of such corporation. *Frost v. Star & Herald Co.*, 118.
2. Process. *See* Process.
3. Terms; Duration. A term of court ends at the time fixed by statute or rule, or on adjourning *sine die* at the end of the term. *Diaz v. Patterson*, 349.
4. Territorial jurisdiction. The territorial jurisdiction of the District Court of the Canal Zone is coextensive with the boundaries thereof. *General Petroleum Co. v. S. S. "David"*, 601.

CRIMINAL LAW.

See Actions (7); Statutes (4-5); Canal Zone (3) Customs (1); Arrest (1).

1. Conspiracy. Where M and F are charged with conspiracy and separate trials were demanded, F being convicted and M acquitted, *held* that F was entitled to a new trial. *Government v. Fajardo*, 44.
2. Parties. The United States is the proper party plaintiff in a criminal action in the Canal Zone. *United States v. Williams*, (*Contra*), 297. *Government v. Livengood (Infra)*, 542.
3. False pretenses. False pretenses of an attorney that he will be able to procure a desired result by action of Government authorities, is not a sufficient basis for charging the crime of obtaining money by false pretenses. *Government v. De Lima*, 442.
4. International extradition; Amending information. Where parties sought to be extradited are present in the jurisdiction and the information specifies a treaty crime, it is proper to allow an amendment to the information in matters of form, giving greater particularity as to the facts constituting such crime. *Voloshin, et al, v. Ridenour*, 445.
5. Deportation. An alien deported because of conviction of crime in the Canal Zone becomes criminally liable on his return to the Canal Zone in violation of the deportation order. *Government v. Diaz*, 465.
6. How created. Criminality must arise from positive provisions of statute or ordinance. It can not be created by presumption or implication. *Government v. Obsitnik*, 472.
7. *Corpus delicti*. *Corpus delicti* in larceny case is the felonious taking of the property of another. *Government v. Garcia*, 479.
8. Assault by means and force likely to produce great bodily injury. Where defendant, a chauffeur, was driving in violation of the rules of the road of the Canal Zone, and while so driving struck the prosecutor with his car, causing severe injury, *held* that defendant is criminally responsible for a violation of Sec. 183 of the Penal Code. *Government v. Webb*, 486.
9. Intent. In such case it is not necessary that the evidence should show a specific intent to injure a particular person, but such intent may arise from proof of the commission of an unlawful act. *Government v. Webb, supra*.
10. Intent; Driving automobile. The driving of an automobile in violation of the law, or driving it recklessly and negligently, without due regard to the rights of others, where injury to another results, supplies the criminal intent necessary to sustain a conviction. *Government v. Webb, supra*.
11. Postal laws and regulations. The postal laws and regulations of the United States are applicable to the Canal Zone under provisions of Sec. 42 of Act No. 8, Laws of the Canal Zone 75. And a person violating such postal laws and regulations may be prosecuted and punished therefore. *United States v. De Peiza*, 566.

CUSTOMS.

1. Smuggling; Criminal liability. Under laws in force in Canal Zone, a person who smuggles goods into the Canal Zone destined for Panama, without payment of Panamanian duty, is criminally liable therefore. *Government v. Lam*, 170.

CREDITORS' BILL.

1. Marshaling of assets. One or more creditors, on proper allegations, may maintain a creditors' bill for the benefit of all creditors. *Corrigan v. Smith*, 145.

DAMAGES.

See Collision (1-2); Libel and Slander (1-2-3-4); Negligence (1-9-10).

1. Measure of, for death of minor son. Where deceased was 3 years and 2 months under age of majority, and the mother had no expectation of receiving support from him after majority, her damages are limited to the loss of maintenance prior to the deceased obtaining majority. *Laport, Admx. v. P. R. R. Co.*, 31.
2. Excessive damages for personal injury. It is *held* that \$2,500 is not excessive damages where, resulting from defendant's negligence, plaintiff was run over by an engine, his arm cut off near the shoulder, and other severe injuries received. *Beckford v. P. R. R. Co.*, 47.
3. Elements of. Pain and suffering are elements of recovery in personal injury actions. *Toppin v. P. R. R. Co.*, 154.
4. *Id.* damages are not recoverable for tuberculosis unless it is shown to have resulted from the injury. *Toppin v. P. R. R. Co., supra.*
5. Excessive. Verdict of jury fixing damages in a personal injury action should not be set aside as excessive unless the verdict was the result of passion, prejudice, or mistake, or gross disregard of the law or facts. *Toppin v. P. R. R. Co., supra.* *Shaw v. Bergen Point Iron Works*, 158.
6. Speculative damages. Failure of a telegraph company to transmit a message to a prospective purchaser relating to the probable rise in price of stocks on the stock market, does not entitle addressee to maintain action for prospective profits. Such damages are speculative. *Morrissey v. Central, etc., Co.*, 161.
7. Speculative. Where injury is sustained as result of negligence by one who is in training to become an officer in the Army but who has not been commissioned, future possible increase in salary as such officer can not be recovered because speculative. *Lee v. Martin*, 162.

DEPORTATION.

See Aliens (1-2-3-5-6).

DIVORCE.

See Jurisdiction (11-12-13); Process (4-5-6); Evidence (6); Judgments (4-6-7).

1. What law governs. Where parties were married in Oklahoma, the divorce laws of that State will be followed here. *King v. King*, 211.
2. Dismissal. Domicile of the person is where he voluntarily fixes his permanent abode. *Simpkins v. Simpkins*, 273.
3. Jurisdiction. This court has jurisdiction to grant divorce only *a mensa et thoro*. It has no jurisdiction to grant an absolute divorce. *Barrett v. Barrett*, 346.
4. Foreign law. The laws of Kansas, where parties were married and lived before coming to the Canal Zone, providing for the granting of divorces does not give this court jurisdiction to grant a divorce. *Barrett v. Barrett, supra.*
5. Plaintiff husband was denied a divorce on insufficient proof, and defendant wife was granted a divorce on cross petition for willful neglect. *Young v. Young*, 460.
6. Extreme and repeated cruelty. The term "extreme and repeated cruelty" can not be definitely defined to establish a rule of general application to all cases. It is a relative term, and each case must be determined upon its own facts. *Morgan v. Morgan*, 497.

7. Habitual drunkenness. Where evidence fails to show ground for divorce for habitual drunkenness as required by statute, yet intoxication of the defendant may be considered as tending to show extreme and repeated cruelty. *Morgan v. Morgan, supra.*
8. Extreme and repeated cruelty. Acts of physical violence are not necessary to be shown to establish extreme and repeated cruelty under the divorce code. It may be established by, and usually is a course of conduct which destroys the peace of mind and happiness, and endangers the health or reason of the injured party. *Morgan v. Morgan, supra.*
9. Residence. In a divorce action the plaintiff's petition must allege and the proof must show that she has resided on the Canal Zone continuously for one year next preceding the filing of the petition, to confer jurisdiction on the court. *Halvosa v. Halvosa, 535.*
10. Cross petition. Where the defendant files an answer and cross petition, alleging a statutory ground for divorce, and the requisite residence on the Canal Zone, the court has jurisdiction to try the issues raised by such cross petition and answer thereto. *Halvosa v. Halvosa, supra.*
11. Plaintiff's cross petition to defendant's cross petition. Where plaintiff's petition is dismissed for lack of residential qualifications, and the court has acquired jurisdiction on defendant's cross petition, the plaintiff may with leave of court after the dismissal of her petition, file a cross petition to the defendant's cross petition under the provisions of Sec. 19 of the Divorce Code. *Halvosa v. Halvosa, supra.*
12. Granted nonresident on cross petition. Where the court acquires jurisdiction of a divorce proceeding on the commencement of the action and the defendant appears and files a cross petition for a divorce, the rights of both parties will be heard and determined in the action and the defendant granted a divorce if the facts warrant it, even though the defendant is a nonresident. *Halvosa v. Halvosa, supra.*
13. *Res Judicata.* Where the plaintiff prosecuted an action against the defendant for a divorce on the ground of extreme and repeated cruelty, ending in a judgment denying the plaintiff's petition for a divorce on September 17, 1924, and where in this action brought for divorce on the same ground she sets up in her complaint the same facts which were alleged in a former action, it is held that judgment of the court in the former action, under the doctrine of *res judicata* precludes the plaintiff from pleading or proving transactions between the parties prior to the former judgment. *Reeves v. Reeves, 578.*

EMPLOYERS' LIABILITY LAW.

See Master and Servant (3-4); Pleading (3).

1. Exclusive remedy. The remedy under the Employers' Liability Law of 1916 is not exclusive, and an action may be maintained under the Employers' Liability Law of 1908 as amended in 1910. *Rance v. P. R. R. Co., 200.*
2. Where action is brought under this law, complaint must contain allegations bringing the case within the provisions of the law. *Brown, Rice, Williams v. P. R. R. Co., 266.*
3. Remedy. The Employers' Liability Law of 1916 does not provide a remedy excluding the right to recover under laws of the Canal Zone. *Rice, Admx. v. P. R. R. Co., 317.*
4. Where it appears that plaintiff's decedent, while driving defendant's ice truck, was killed as result of defendant's negligence, recovery may be had under Employers' Liability Law of 1908. *Mc Neil v. P. R. R. Co., 435.*

EMPLOYER AND EMPLOYEE.

1. Breach of contract; Action for, not divisible. A right of action for breach of contract of employment is not divisible, and successive actions can not be maintained therefore. *Judd v. Sexton*, 141.

ESTATES.

See Succession (1-2-3-4).

1. Letters of administration. Issuance by clerk of letters of administration pursuant to order of the court, show sufficient authority to enable plaintiff to sue in representative capacity. *Laport, Admx. v. P. R. R. Co.*, 27.
2. Bond of administrator. Under C. C. P., Sec. 678, administrator must give bond in such sum as court directs. Until court makes direction no bond is required, and the fact that letters were issued without bond does not bar plaintiff from maintaining action in representative capacity. *Laport, Admx. v. P. R. R. Co.*, 31.

EVIDENCE.

See Probable Cause (1); Negligence (8); Prescription (2); New Trial (2-3); Attorneys (2); Res Gestae (1).

1. Burden of proof. The burden of proof is on the person seeking recovery on a contract made with an agent to show the authority of the agent. *American T. D. Co. v. Texas Co.*, 238.
2. Best and secondary. Before secondary evidence is admissible notice must be given to the adverse party in whose possession it is to produce the same. An exception to this rule is where the best evidence is in a foreign country. *American T. D. Co. v. Texas Co.*, *supra*.
3. Illegal search and seizure. Contraband narcotics, obtained by illegal search and seizure, are not admissible in evidence. *United States v. Almoguera*, 402.
4. Proof of *corpus delicti*. This may be proved by circumstantial evidence. *Government v. Garcia*, 479.
5. *Corpus delicti*; Larceny; Proof; Facts discussed and held that proof is sufficient to establish the *corpus delicti* even though the owner of the property stolen is not present and did not testify. *Government v. Garcia*, *supra*.
6. Burden of proof in divorce action. Where a wife sues for divorce on the ground of extreme and repeated cruelty, she must under the divorce code show that the defendant has committed acts, (1) involving grievous bodily injury, or (2) acts producing grievous mental suffering, endangering life, health or reason, and (3) that she was without fault. *Reeves v. Reeves*, 578.

EXECUTION.

See Appeal and Error (4).

EXPROPRIATION.

See Constitutional Law (1).

1. Remedy for compensation for land expropriated. Act No. 21 of L. C. Z. does not furnish the remedy for recovery of compensation for expropriated land. The exclusive remedy is a claim to the Joint Commission under the provisions of the treaty between the United States and Panama. *Bressie, et al., v. Goethals, et al.*, 38.

EXTRADITION.

1. Validity of second arrest. Where an extradition proceeding is brought under the provisions of R. S. 5270, which does not limit the number of preliminary warrants of detention which may be issued, a second warrant, if procured in good faith, may be issued even though the treaty provides that the person sought to be extradited may not be detained longer than 2 months. *Voloshin, et al., v. Ridenour*, 445.
2. Two proceedings. Where petitioners were detained on one warrant from May 28 to July 28, when the first proceeding was dismissed for lack of proper certification of proofs of criminality and another warrant was issued on a new information, the two proceedings are separate and distinct, and the limit of 2 months' detention prescribed in the treaty applies to each proceeding separately. *Voloshin, et al., v. Ridenour, supra*.
3. *Habeas corpus*; When granted. Where facts disclosed that demanding country was furnished with executive warrant for removal of parties sought to be extradited and failed to remove them from October, 1924, to January 21, 1925, it appearing that there was ample transportation for such removal between the Canal Zone and the demanding country, *held* that the delay of the demanding country in the removal of the petitioners was unduly prolonged and the writ of *habeas corpus* should be granted. *Voloshin, et al., v. Ridenour, supra*, 482.
4. Information in extradition proceeding may be amended as to matters of form. *Voloshin, et al., v. Ridenour*. 445.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant (3-4); Employers' Liability Law (1-4).

1. Contributory negligence. The Federal Employers' Liability Act of April 22, 1908, abolished the defense of contributory negligence. *Laport, Admx. v. P. R. R. Co.*, 31.

FOREIGN CORPORATIONS.

See Courts (1); Process (2).

GUARDIANS.

1. Property in Canal Zone. Where a nonresident insane person has property in the Canal Zone, a guardian of such property may be here appointed and may maintain action with respect thereto. *Dixon, Guardian, v. Smith, Auditor*, 186.

HABEAS CORPUS.

See Aliens (2-3-6); Immigration (1-2-3-4).

1. Deportation case. *Habeas corpus* may not be used as a writ of error or review; it may not be invoked against an order of deportation made after hearing constituting due process and after entry of valid order of deportation. *Ex parte Deal*, 372.
2. When available. Where the Canal Zone police as an act of comity and in good faith accepted the temporary custody of the petitioner for one night and redelivered him to the Panaman police at 8.45 a. m., the next morning, and the writ of *habeas corpus* was not served on the Zone police until 10.55 a. m., on the same day, it is *held* that the writ should be discharged. *Ex parte Pedro*, 588.

HUSBAND AND WIFE.

See Actions (2).

1. Action for wrongful death. A husband may maintain an action for wrongful death of the wife. *Rock v. P. R. R. Co.*, 220.

IMMIGRATION.

See Canal Zone (4-5-6-8); International Law (1-2-4-5); Aliens (2-3-4-5).

1. *Habeas corpus*. Where petitioner is detained pending a hearing to determine the question of his deportation, and he institutes a *habeas corpus* proceeding, the court may continue the *habeas corpus* proceeding for a reasonable time to enable the immigration officers to complete their proceedings and make their findings and orders therein. *In re Nuñez*, 519.
2. *Habeas corpus*. At the final hearing in a *habeas corpus* proceeding, if it appears the petitioner has had a lawful hearing, before proper authority, and a legal order of deportation has been duly made, the writ of *habeas corpus* should be discharged. *In re Nuñez, supra*.
3. *Habeas corpus*. Authorities of the Canal Zone may arrest any person subject to deportation and detain such person for a reasonable time until a proper hearing can be had and a determination reached as to whether such person shall be ordered deported. *In re Nuñez, supra*.
4. *Habeas corpus*; When writ granted. If any essential fact, necessary to the making of a valid order of deportation, is unsupported by substantial evidence, the court may intervene by a writ of *habeas corpus*. *In re Nuñez, supra*.
5. Conduct of person detained. A person detained for deportation who fails or refuses to explain to the immigration authorities his purpose in coming to the country, gives the immigration authorities warrant for inferring that he is here with a dishonest purpose. *In re Nuñez, supra*.
6. Exclusion. Where it is shown that a person entering the Canal Zone was at the time of entry an undesirable, his entry into the Zone is illegal and the immigration authorities may thereafter, upon proper proceedings, deport the petitioner after a hearing and on a proper order. *In re Nuñez, supra*.

INJUNCTION.

1. Property outside jurisdiction. Where property outside the jurisdiction is about to be transferred fraudulently, this court which has jurisdiction of the persons about to make such fraudulent transfer may enjoin the making thereof. *Corrigan v. Smith*, 145.
2. Executive officer. The courts will not restrain an executive officer in performance of lawful duty involving the exercise of judgment and discretion. *McConaughy v. Morrow*, 377.
3. Heads of departments under executive. Injunction does not lie to restrain the Governor and other officers of The Panama Canal from carrying out the Executive Order of December 3, 1921, concerning free quarters. *McConaughy v. Morrow, supra*.

INTEREST.

1. Money deposited in court. Where money is deposited in the registry of the court subject to the court's order, interest thereon prior to decree is not recoverable in the absence of stipulation of the parties. *Diaz v. Patterson*, 466.

INTERNATIONAL LAW.

1. Deportation of undesirables. In the exercise of its sovereignty a nation may receive into its territory an alien, but this is a matter of pure permission or simple tolerance, creating no obligation, and the Government of the nation may, if the interests of the country require it, exclude or deport foreign undesirables, and the presence of such alien may be terminated at the will of such Government without notice. *In re Nuñez*, 519.
2. Deportation of aliens under treaty. Where petitioner entered a Canal Zone port and transited the Zone to Panama and was thereafter arrested in Panama as an undesirable and sent to the Canal Zone with a request from the Panaman Government to our immigration officials that he be deported, it was the duty of our immigration authorities, under the treaty with the Republic of Panama, to take custody of the petitioner, investigate the case, and if the facts warranted, exclude or deport him. While the authorities of the Canal Zone are not bound to deport a person on the request of the Republic of Panama, such request should have persuasive effect under the circumstances of this case with the immigration authorities of the Zone, leading them to take jurisdiction in the matter, investigate the case and take such action as the facts and law warrant. *In re Nuñez, supra*.
3. Comity. The law of a foreign jurisdiction necessary to be pleaded and proved to entitle the plaintiff to recovery will be applied here only as a matter of comity. *Sattler, et al, v. S. S. "Urubamba,"* 404.
4. Comity defined. Comity between nations is the recognition which one allows within its territory to the legislative, executive or judicial acts of the other, having due regard to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws. *Ex parte Pedro*, 588.
5. Comity applied. Where Panaman authorities decided to deport Pedro from Panama to Spain and requested the Canal Zone police to take and hold the custody of him for a short period of time, to which the Canal Zone police consented, it is *held* that the act of the Canal Zone police in taking such custody and detaining Pedro temporarily was an act of comity, and such custody was lawful, but that there being no treaty or law of the Canal Zone requiring such acceptance of custody, the Canal Zone police could accept or refuse such custody at their pleasure. *Ex parte Pedro, supra*.

JOINT COMMISSION.

See Adverse Claimants (1).

1. Award by. An award made by the Joint Commission is conclusive except for fraud or corruption, or lack of jurisdiction. *Humber, Admr. v. Smith, Auditor*, 136.

JUDGES.

1. Disqualification of district judge. Sec. 8, C. C. P., specifies the only ground for the disqualification and withdrawal of the district judge. Said section does not include prejudice. *Townsley v. Hamlin*, 553.
2. Disqualification of district judge; how shown. Sec. 8, of the C. C. P., does not provide a peremptory remedy for the disqualification of the district judge. It provides for the determination of the question, and such determination involves a hearing and a consideration of all the pertinent facts submitted. *Townsley v. Hamlin, supra*.

JUDGMENTS.

1. Foreign judgments; *Res judicata*; Comity. Judgment rendered in the Republic of Panama is not *res judicata* in Canal Zone under international comity; it is *prima facie* only. *Diez v. Schubert*, 57.
2. Foreign judgments; *res judicata*; comity. Where a foreign country gives conclusive effects to our judgments, comity requires that we give like effect to their judgments. *Diez v. Schubert, supra*.
3. *Res judicata*; what included. All matters litigated, or which might have been litigated, between the parties in an action, are *res judicata*. *Diez v. Schubert, supra*.
4. Effect of foreign judgments. Foreign judgments are presumptive evidence only and may be repealed by showing lack of jurisdiction, fraud, collusion, repugnancy to the local law, or clear mistake of law or fact. *Simpkins v. Simpkins*, 273.
5. When may be vacated. A judgment of this court may be vacated only during the term at which it was rendered. *Diez v. Patterson*, 349.
6. *Res judicata*; Divorce. The doctrine of *res judicata* is applicable to divorce actions to the same extent and with the same limitation as to other actions. *Reeves v. Reeves*, 576.
7. Form of, validity. Where the court has jurisdiction of the parties and the subject matter of the action, and a trial on the merits is had and the court announces its decision, and such decision is recorded by the clerk in the minute book of the court in which all orders, judgments and decrees of the court are recorded, showing the title of the court and the cause, the nature of the action, that a trial was had, and a denial of the relief demanded by the plaintiff in her petition, such record has all the elements of a valid judgment and will be so considered. *Reeves v. Reeves*, 578.

JURISDICTION.

See Actions (1-3); Adverse Claimants (1); Courts (1); Guardians (1); Process (1-2-4-5-6); Constitutional Law (3); Pleading (6-9-11-15-16); Appeal and Error (2).

1. Transitory actions. On grounds of public policy, Canal Zone courts will decline jurisdiction in transitory actions where parties are alien to the jurisdiction where the cause of action arises in the Republic of Panama and where the courts of that country are open to the litigants. *George v. United Fruit Co.*, 20.
2. Injunction. Injunction does not lie to restrain the United States from dispossessing former owners of lands in the Canal Zone without first paying compensation therefore. *Dixon v. Goethals*, 23. *Anderson v. Goethals*, 23.
3. Cause of action arising in the Canal Zone. Although defendant is a foreign corporation, it is subject to suit in the courts of the Canal Zone, it appearing that it transacts business here and that the cause of action accrued in the Canal Zone. *Laport, Admx. v. P. R. R. Co.*, 27.
4. Injunction. Courts will not enjoin dispossession of plaintiffs by United States of lands in the Canal Zone, the plaintiffs having presented a claim for compensation to the Joint Commission. *Bressie, et al, v. Goethals, et al.*, 38.
5. Crime partly committed in Canal Zone. Under Sec. 34 Penal Code, where any part of the crime is committed in the Canal Zone the courts of the Zone have jurisdiction of the action. *Government v. Fajardo*, 44.

6. Suit *vs.* United States. A suit in mandate against the auditor to compel performance of a purely ministerial duty, is not a suit against the United States. *Humber, Admr. v. Smith, Auditor*, 136.
7. Appearance. Where nonresident defendant makes a general appearance in an action, the right to have service of process set aside is waived. *Corrigan v. Smith*, 145.
8. Nonresident parties. Where parties are both nonresident but defendant has property in the Canal Zone which is attached in the action, the court has jurisdiction. *Lombard v. Panama Gas Co.*, 169.
9. Appearance of defendant. General appearance of defendant by filing demurrer to the complaint confers jurisdiction of the person of the defendant. *Lombard v. Panama Gas Co.*, *supra*.
10. Where a husband and wife file a petition for adoption of a minor under 14 years of age, and a third party was appointed as the minor's next friend, and a decree of adoption was entered without notice to the nonconsenting father of the child who was alleged to have abandoned the minor, and the father had no knowledge of the proceeding and made no appearance therein, the court had no jurisdiction to enter such decree, and the decree is void. *In re Adoption of Adella Markert*, minor, 501.
11. Publication of process in divorce action. The issuance and publication of process in the manner pointed out in the Divorce Code is necessary to give the court jurisdiction to try the case and enter a decree. *Muldoon v. Muldoon*, 475.
12. In divorce actions. In such actions the plaintiff must at the inception of the action, by a verified complaint or a complaint and the affidavit required by subdivision (b) of Sec. 13 of the Divorce Code, exhibit every jurisdictional fact necessary to maintenance of the action, and a failure in this regard precludes the court from exercising jurisdiction. *Gillette v. Gillette*, 584.
13. The provisions of subdivision (b) of Sec. 13 of the Divorce Code, requiring the plaintiff to exhibit a sworn statement of facts as to residence and occupation, are mandatory and must be complied with to give the court jurisdiction of the action. *Gillette v. Gillette*, *supra*.

LANDLORD AND TENANT.

1. Prior laws; notice to lessees. A lessee of property is bound to take notice of laws and treaties in effect at the time a lease is made. *Bressie, et al., v. Goethals, et al.*, 38.

LACHES.

See Limitation of Actions (1-2).

LARCENY.

See Criminal Law (7); Evidence (4-5).

LIBEL AND SLANDER.

See Statutes (6); Pleading (12-13-14).

1. Damages. Damages for mental anguish and humiliation are recoverable in such actions. *Morley v. Mann*, 149.
2. Malice. Malice may be inferred from falsity of statement and want of probable cause. *Morley v. Mann*, *supra*.

3. Exemplary damages. Such damages are recoverable in an action for libel under appropriate facts. *Morley v. Mann, supra* (Compare *Townsley v. Hamlin*), 557.
4. Retraction; Damages. Retraction and apology will be considered in the reduction of damages. *Gill v. Watson*, 178.
5. Damages recoverable. The plaintiff may recover only compensatory damage in a slander case. Under Art. 2341 of the Civil Code, exemplary or punitive damages are excluded. *Townsley v. Hamlin*, 557.
6. What is slander? The definition of slander, as determined by analogy to the principles of the common law and established by the decisions of the courts of the United States, adopted in this action. *Townsley v. Hamlin, supra*.

LIENS.

See Attorneys (1).

LIMITATION OF ACTIONS.

1. Admiralty. Statute of limitation of one year in personal injury actions will be applied by analogy to a maritime tort action for personal injury. *McGrath v. P. R. R. Co.*, 410.
2. Statute of limitation; Foreign country. The statute of limitation of the Republic of Panama, fixing the time for the commencement of injury actions, does not apply to the Canal Zone. *McGrath v. P. R. R. Co., supra*.

MALICIOUS PROSECUTION.

See Malice (1).

1. Probable cause. Where plaintiff was ejected from defendant's train after paying fare because he had no hat check and defendant by checking its records could have ascertained in advance of prosecution that such fare had been paid, there is lack of probable cause for prosecution of defendant for riding on train without payment of fare. *Davis v. P. R. R. Co.*, 51.

MALICE.

See Libel and Slander (2).

1. Malicious prosecution. Malice may be inferred from lack of probable cause in a case of malicious prosecution. *Davis v. P. R. R. Co.*, 51. *Bulgares v. Best*, 56.

MANDAMUS.

1. Ministerial duty; Auditor Panama Canal. Where funds are in the hands of the Auditor of The Panama Canal for payment of a claim adjudicated by the Joint Commission, and nothing remains to be done but make payment, the duty of the auditor is purely ministerial and mandamus will lie to compel payment.
Humber, Admr. v. Smith, Auditor, 136.
Dixon, Guardian v. Smith, Auditor, 186.

MARSHAL.

1. Return of. *See Process 7.*

MASTER AND SERVANT.

See Actions (1-2); Employers' Liability Law (1-2-3-4).

1. Suit for wages. In a suit for wages where the employee has received cash from his employer, it is presumed, in the absence of a contrary showing, that such cash payments were to be applied on wages. *McEwen v. Neville*, 42.
2. Negligence. Failure to keep a lookout for and give warning to employees of a railroad company engaged in repairing tracks, is negligence. *Beckford v. P. R. R. Co.*, 47.
3. Canal Zone Employers' Liability Act. This act furnishes an exclusive remedy to persons employed by Panama Canal and Panama R. R. Co., repealing the Federal Employers' Liability Act as to the Canal Zone.
Chisholm v. P. R. R. Co., 109.
Gittens v. P. R. R. Co., 109.
Smith v. P. R. R. Co., 109.
Greenidge v. P. R. R. Co., 133.
4. Negligence of fellow servant. Under Employers' Liability Law, negligence of a fellow servant does not bar recovery. *Rance v. P. R. R. Co.*, 200.

MINORS.

See Succession (1-2-3); Adoption (1).

MORTGAGES.

1. Suit on secured note. Plaintiff may sue and recover on notes secured by mortgage without first exhausting security. *Curtis v. Whittaker*, 207.

NAVY.

See Search and Seizure (3); Arrest (2-3).

1. Regulations. Secretary of Navy has not the power under R. S. 1547, to make regulations in conflict with the Eighteenth Amendment to the Constitution and the National Prohibition Act. *Government v. Flannery and Lorenz*, 592.

NEW TRIAL.

1. A new trial will be granted where the recovery of damages is excessive. *Toppin v. P. R. R. Co.*, 154.
2. Newly discovered evidence. A new trial will not be granted for newly discovered evidence where the facts were within the peculiar knowledge of the moving party, or could have been discovered before trial by the exercise of reasonable diligence. *Shaw v. Bergen Point Iron Works*, 158.
3. When granted. Where plaintiffs complaint and proof are insufficient to sustain judgment, or where substantial error or some fatal defect appears in the record, a new trial should be granted. *Otero v. Maryland C. Co.*, 360.

NEGLIGENCE.

See Master and Servant (2-4); Pleading (3).

1. Damages. Under Art. 2341, Civil Code, one guilty of negligence is liable for consequent damage resulting therefrom. *Toppin v. P. R. R. Co.*, 154.
2. Proximate cause. Defined and applied in a negligence case. *Burkett v. Panama Elec. Co.*, 204.

3. Contributory negligence. Even though plaintiff negligently placed himself in a dangerous situation, yet where the defendant was negligent and but for such negligence could have avoided the accident, the defendant will be held responsible. *Burkett v. Panama Elec. Co., supra.*
4. Independent lessee of auto. The owner of an auto is not liable for the negligence of an independent lessee thereof resulting in injury to another. *Lindo v. Barker, 437.*
5. Assumption of risk. An employee does not assume risk of which he has no knowledge. There must be knowledge, followed by continuance of the work, with full appreciation of its dangers, to establish such defense. *Rowe v. Royal Netherlands West India Mail, 453.*
6. What is. Where a plank forming a part of a hatch covering was too short, or improperly placed, and plaintiff in the course of his employment stepped thereon and fell through the hatch, sustaining injuries, the ship was negligent, and such negligence was the proximate cause of the injury. *Rowe v. Royal Netherlands West India Mail, supra.*
7. Presumption. Negligence is not presumed from the happening of an accident. *Rowe v. Royal Netherlands West India Mail, supra.*
8. Diseased condition, damages. The diseased condition of the plaintiff following an injury is not presumed to be the result of the injury. Where plaintiff is afflicted with tertiary syphilis at the time of his injury, his damages with respect thereto will be limited to compensation for such aggravated condition of the disease resulting from the injury. *Rowe v. Royal Netherlands West India Mail, supra.*
9. Duty and liability of bailee. Bailee in this case was bound to use ordinary care to preserve and protect the property bailed while in his possession and is liable for damages resulting from lack of such care. *Roberts v. Biron, 506.*
10. Third party; Proximate cause. Where the injury complained of, while the automobile, the bailed property, was in the hands of bailee, resulted from the negligence of a third party and circumstances over which the bailee had no control, he is not liable therefore even though driving the bailed car at a rate of speed slightly in excess of the lawful rate. *Roberts v. Biron, supra.*

OFFICERS.

1. Ministerial duty. An act is ministerial where the law defines the performance of the duty with such precision and certainty as to leave nothing to judgment and discretion. *McConaughy v. Morrow, 377.*

PANAMA CANAL.

1. Employees; Vested rights. Employees of The Panama Canal under the laws, rules and regulations of the Canal Zone have no vested rights to free quarters or other similar privileges. *McConaughy v. Morrow, 377.*
2. Employees; Regulations concerning free quarters. The regulations giving employees the privilege of free quarters and other like privileges are revocable and were not validated by Sec. 2 of the Panama Canal Act. *McConaughy v. Morrow, supra.*

PARENT AND CHILD.

See Succession (2-3).

1. Action for wrongful death. The mother of an illegitimate child may maintain an action for its wrongful death. *Castilla v. P. R. R. Co., 220.*

PARTIES TO ACTION.

See Statutes (4-5); Actions (7).

PARTNERSHIP.

1. Action against. An action against "A, doing business in the firm name of 'E. W. Levy & Co.' " without allegations of the existence of a partnership, is an action against A individually and not against the partnership. *Bodden v. Abrams*, 103.
2. Funds of. The funds of a partnership are not subject to attachment in a suit against an individual partner. *Bodden v. Abrams, supra*.
3. Liability of. Liability of partnership for a partnership debt is joint and not several, and all partners must be joined in action thereon to render partnership liable. *Bodden v. Abrams, supra*.

PLEADING.

See Divorce (9-10-11); Trial (1).

1. Surplusage. Unnecessary allegations of a pleading are to be disregarded. *Bressie, et al, v. Goethals, et al.*, 38.
2. Contracts. Where plaintiff pleads contract as having been made between the parties, one of whom signs by F. H. A., and it does not appear that F. H. A. is an independent contractor, a demurrer to the complaint will be overruled. *Lombard v. Panama Gas Co.*, 169.
3. Negligence. Complaint in personal injury action must allege a duty on the part of the defendant and a breach of such duty amounting to negligence with resulting compensable injury. *Brown, Rice, Williams, v. P. R. R. Co.*, 266.
4. Exhibits attached to complaint. An exhibit attached to a pleading and made part thereof by reference is as much part of the complaint as if set out therein. *Otero v. Maryland C. Co.*, 360.
5. Performace of contract. Setting out a policy of insurance in the complaint does not supply the lack of allegations of performance by the plaintiff and breach by the defendant. *Otero v. Maryland C. Co., supra*.
6. Conditions precedent. Where policy of insurance specifies conditions precedent to be performed by the plaintiff, plaintiff must allege performance thereof to state a good cause of action. *Otero v. Maryland C. Co., supra*.
7. Credit to ship. It is not necessary for the libellant to plead or prove that credit was given to the ship. This is presumed from the provisions of act of Congress of 1910. (36 Stat. 604.) *American Foreign Banking Corp. v. S. S. "Everest,"* 395.
8. What considered on demurrer. Plaintiff filed a complaint and afterwards an amended complaint which did not show when the original complaint was filed. On demurrer to the amended complaint the court can not consider the date of the filing of the original complaint. Only the amended complaint and demurrer thereto may be considered. *Otero v. Maryland C. Co., supra*, 411.
9. Condition precedent. It is sufficient for plaintiff to allege generally that he has complied with and performed the conditions precedent specified in a policy of insurance, without alleging the definite acts of performance. *Otero v. Maryland C. Co., supra*, 360.
10. Suit for wrongful attachment. In such suit it is not necessary to plead malice or lack of probable cause to entitle a party to damages for the wrongful issuance and levy of an attachment. *Lindo v. Barker*, 437.

11. Status of defendant's cross petition. Where defendant files a cross petition in a divorce action and alleges and proves all of the jurisdictional facts, and the plaintiff's petition is dismissed, such cross petition of the defendant stands as an original petition as if the defendant had originally commenced the action, and plaintiff may, with leave of court, after dismissal of her petition file a cross petition to the defendant's cross petition, or otherwise plead thereto. *Halvosa v. Halvosa*, 535.
12. Inducement; Defined and applied. *Townsley v. Hamlin*, 557.
13. Colloquim; Defined and applied. *Townsley v. Hamlin, supra*.
14. Innuendo; Defined and applied. Holding that proper allegations of inducement or colloquim can not be supplied by innuendo except by the use of traversable allegations therein. *Townsley v. Hamlin, supra*.
15. Residential competency in divorce. The residential competency of the plaintiff to maintain a divorce action may be established either by the affidavit required by subdivision (b) of Sec. 13 of the Divorce Code, or by exhibiting the necessary facts in a verified complaint which may be treated as an affidavit under said subdivision (b) of Sec. 13. *Gillette v. Gillette*, 584.
16. Foreign law. Where admiralty action is brought by mariners employed at Cardiff, Wales, for a voyage to Callao, Peru, and the voyage was completed and the mariners bring suit for the difference between the English gold pound, which they claim was the medium of payment under the contract, and Peruvian paper pounds in which they were paid under their protest, it is necessary for the libellants to plead and prove the law of Great Britain to give the court jurisdiction. *Sattler v. S. S. "Urubamba"*, 404.

PRESCRIPTION.

1. Adverse claimants. Where owners of adjoining land have for 30 years recognized a fence as constituting the true boundary between them, and one of them has held adverse possession of his tract of land, his title is good by prescription. *Obarrio v. Arias*, 179.
2. Boundaries. More weight will be given to recorded instrument describing real estate than evidence of witnesses as to actual possession. *Diaz v. Patterson*, 214.
3. *Id.* Prescription does not obtain against a recorded title unless based on another recorded title. *Diaz v. Patterson, supra*, 214.

PRESIDENT.

See Canal Zone (5-8).

PRESUMPTIONS.

See Negligence (8); Pleading (7); Admiralty (6); Criminal Law (6).

PRIVILEGED COMMUNICATIONS.

See Attorneys.

PROCESS.

See Statutes (3).

1. Exemption from service of. A nonresident who is present in court as a witness and attorney in fact for a litigant, is exempt from service of summons. *Frost v. Star & Herald Co.*, 118.

2. Service on foreign corporation. Under Sec. 411 C. C. P., service of summons can only be made on a managing or business agent, cashier, or secretary of a foreign corporation, or an agent authorized to accept service of process. *Frost v. Star & Herald Co., supra.*
3. Process; Setting aside. Process will not be set aside where the defendant has made a general appearance in the action. *Corrigan v. Smith*, 145.
4. Publication of. The notice of pendency of suit required to be published in cases of publication of process in a divorce action must be signed by the clerk and attested with the seal of the court. *Muldoon v. Muldoon*, 509.
5. Where the court held that the first publication of the proceedings in this case were void, and quashed the service of process, the notice of pendency of suit issued by the clerk in such void proceedings became *functus officio*, requiring the issuance of a new notice of pendency of suit upon the second affidavit for publication of process. *Muldoon v. Muldoon, supra*, 509.
6. By publication; Proof. Where process in a divorce action is served on an absent defendant by publication, the proof upon the trial must show the truth of the statements contained in the affidavit upon which the service by publication is based, and if the proof shows that the case is one where publication of process may not be had the service by publication is void, and the court acquires no jurisdiction of the case in the absence of appearance by the defendant. *Gillette v. Gillette*, 584.
7. Marshal's return; Presumption. Marshal's return on process is presumptively correct and one seeking to set the same aside must show falsity by clear and satisfactory evidence. *General Petroleum Co. v. S. S. "David,"* 601.

PRINCIPAL AND AGENT.

See Evidence (1).

1. Authority of agent. The authority of an agent may be express or implied. *American T. D. Co. v. Texas Co.*, 238.
2. Rights and duties of third party. A third party dealing with an agent is put on inquiry to determine the extent of the agent's authority. *American T. D. Co. v. Texas Co., supra.*
3. To what extent principal bound. A principal is not bound by the unauthorized acts of his agent, but is bound by the acts of his agent acting by specific authority, by acts which principal knowingly and customarily permits the agent to exercise, and by acts which hold out the agent as possessing the requisite authority. *American T. D. Co. v. Texas Co., supra.*
4. Corporations; Principal. Corporations are liable as principals to the same extent as natural persons. *American T. D. Co. v. Texas Co., supra.*
5. Liability of agent. Where an agent within the scope of his authority employed the plaintiff for a certain period of time and then, still acting within the scope of his authority, discharged the plaintiff, such agent is not liable to the plaintiff for such discharge even though wrongful. *Seraphim v. Shropshire*, 490.
6. Right of action of principal. Where F stole funds from G who was postal agent of the plaintiff, F being G's employee, G can maintain action to recover the funds without joining his principal. *Republic of Colombia, et al., v. Fajardo, H., et al.*, 35.

PROBABLE CAUSE.

See Malicious Prosecution (1).

1. Dismissal of a criminal prosecution by the court establishes *prima facie* a want of probable cause. *Bulgares v. Best*, 56.

PROXIMATE CAUSE.

See Negligence (3-7-9-11).

REMEDIES.

1. Election of; Wrongful attachment. Where a writ of attachment has been wrongfully issued and levied, defendant may recover damages sustained by suit on attachment bond, or by an action on the case as if no bond had been given. *Lindo v. Barker*, 437.

RES GESTAE.

See Evidence (4-5).

1. Declaration of defendant. Declarations made by defendant at the time of the transaction, and as a part thereof, are a part of the *res gestae*. *Government v. Garcia*, 479.

RES JUDICATA.

See Judgments (1-2-3-4-6).

SALES.

See Admiralty (2).

SEARCH AND SEIZURE.

1. Illegal. Search of defendant's room on board ship to which defendant had key and exclusive possession, by a Zone policeman, with the consent of master of the ship, without a search warrant, is illegal. *United States v. Almoguera*, 402.
2. Without warrant. Peace officer may search, upon probable cause, for intoxicating liquors and if found, seize the same. *Government v. Flannery and Lorenz*, 592.
3. Navy cutter with intoxicating liquors on board in Canal Zone waters, subject to search and seizure the same as other "water craft." *Government v. Flannery and Lorenz*, *supra*.

SMUGGLING.

See Customs (1).

SOVEREIGNTY, EFFECT OF TRANSFER OF.

See Treaties (1-2), Canal Zone (3).

STATUTES.

See Common Law (2).

1. Construction of. The laws of the Canal Zone where doubtful should be construed in harmony with the laws of the United States. *Greenidge v. P. R. R. Co.*, 133.
2. Repealed. The Employers' Liability Law of 1916 does not by implication repeal the laws of the Canal Zone providing a remedy for injury caused by negligence. *Rice, Admx. v. P. R. R. Co.*, 317.
3. Construction. A statute providing for substituted service of process, like that found in the Divorce Code, must be strictly construed, and if not strictly complied with service of resulting process will be quashed in appropriate proceeding. *Muldoon v. Muldoon*, 475.

4. Ratification. Sec. 5 of the Code Criminal Procedure, was expressly confirmed by Sec. 2 of the Panama Canal Act and has the force of a Congressional enactment. *Government v. Livengood*, 542.
5. Repeal by implication. Repeal of statutes by implication is not favored. Sec. 5 of the Code Criminal Procedure has not been repealed directly or by implication by the enactment of the Panama Canal Act and Amendments thereto. *Government v. Livengood*, *supra*.
6. Construction. If there is doubt or uncertainty as to the construction of a law of the Canal Zone, the statute should be construed in harmony with the recognized principles of jurisprudence prevailing in the United States, and by analogy to the principles of the common law. *Townsley v. Hamlin*, 557.

SUCCESSION.

1. Next of kin; Illegitimates. Illegitimate relative regarded by statute as next of kin may inherit under Civil Code of the Canal Zone. *Laport, Admx. v. P. R. R. Co.*, 27.
2. Illegitimates; Next of kin. The illegitimate sister of the deceased is not entitled to inherit, but the illegitimate mother is entitled to inherit. *Laport, Admx. v. P. R. R. Co.*
3. Persons who succeed. The surviving mother succeeds to the estate of her natural child who dies intestate, single, and without issue. Upon the death of the mother, single and intestate, such estate descends to her children or their heirs. *In re Ballen*, Guardian, 206.
4. Where deceased left no wife, issue or legal ascendants or descendants, but left one brother and two sisters, and the brother claimed the entire estate, it was held that the term "brothers" appearing in Art. 1047 of the Civil Code should be construed to read "brothers and sisters" under the provisions of Arts. 33, 44, 1041, 1042, 1045 and Art. 87 of law 153 of 1887 of the Civil Code. *In re Estate of Malone*, 548.

TRIAL.

Verdict Curing Defects, *See* Actions (6).

1. Separate trial of issues. A plea in bar, such as *res judicata*, is a defense to the action and should be pleaded as such, and the defendant is not entitled to a separate trial thereon. *Reeves v. Reeves*, 576.

TREATIES.

See Canal Zone (3), Aliens (5).

1. Constitutional law. Treaty between the United States and Panama for expropriation of land in the Canal Zone without precedent payment of compensation therefore is not violation of due process clause of United States Constitution or that of Panama. *Dixon, Anderson v. Goethals*, 23.
2. Constitutional law. Where a Government by treaty parts with sovereignty over part of its domain, constitutional provisions of the granting sovereign do not apply.
Dixon v. Goethals, 23.
Anderson v. Goethals, 23.
3. Exclusive remedy. Proceedings before the Joint Commission provided for in the treaty between the United States and Panama is the exclusive remedy for recovery of compensation for lands in the Canal Zone. *Bressie, et al., v. Goethals, et al.*, 38.

UNITED STATES.

See Jurisdiction (6).

WAIVER.

1. Right to set aside process. *See* process (3).

WITNESSES.

1. Fees, when taxable. The provisions of C. C. P., Sec. 817, as to the taxation of witnesses' fees and mileage as costs are directory, and in equity such fees may be taxed without the affidavit required by said section. *Diaz v. Patterson*, 466.

WORDS AND PHRASES.

1. "Immediately." This word in an accident policy relating to the time when a disability occurs, means "presently and without any substantial interval of time." *Otero v. Maryland C. Co.*, 401.
2. "Exclude" and "Excluded" defined. The terms "exclude" and "excluded" used in the Executive Order relating to immigration, comprise the power to persons from entering the Canal Zone and the power to deport persons found in the Canal Zone who are subject to exclusion or deportation. *In re Nunez*, 519.
3. The word "Crook." The word "crook" does not impute a crime, and the mere use of that word without imputation of unfitness to perform the duties of an office or want of integrity in the discharge thereof, or to prejudice a party in his profession, trade, or employment or where no special damage is shown, is not slanderous. *Townslev v. Hamlin*, 557.



